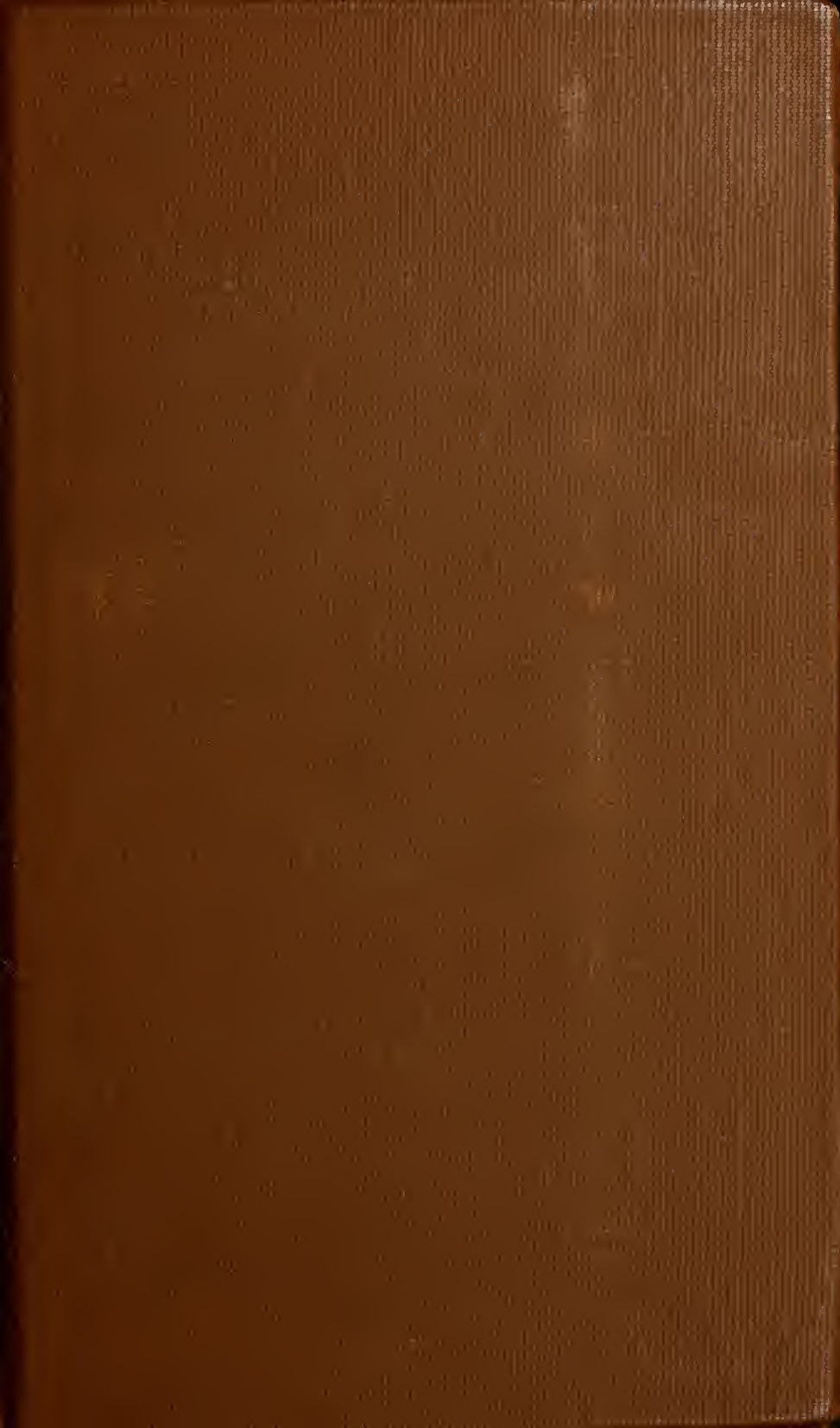






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THE
LAW AND PRACTICE
OF
INJUNCTIONS:

WITH A
Supplement

CONTAINING
THE CASES DECIDED SINCE 1841.

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LONDON :
S. SWEET, 1, CHANCERY LANE, FLEET STREET,
Law Bookseller and Publisher ;
HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1849.

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D 8212
1840

LONDON:
PRINTED BY G. REWORTH AND SONS,
BELL YARD, TEMPLE BAR.

MSF 21 Oct 53

PREFACE TO THE SUPPLEMENT.

SINCE the publication of the original Treatise in 1841 a considerable number of cases has been decided,—the principles on which equity proceeds in the exercise of its prohibitory jurisdiction have been more fully explained,—and the practice has been consolidated and reduced to a more definite and positive system. Under these circumstances it has been thought that it would be useful to collect the new cases, referring them to the several heads of jurisdiction under which they properly fall. In the addition now made to the original work, the writer has endeavoured to explain the present state of the law and practice, and he believes that he has not omitted any material information.

A new, and, it is hoped, sufficiently extensive Index, to the original as well as to the new matter, has been added. The division of chapters and classification of subjects, which were resorted to in the original Treatise, have also been adopted

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in the Supplement, as it has been thought that, whether the arrangement is the best that could be made or not, the convenience of the reader would be best consulted by adopting uniformity of arrangement.

*New Square, Lincoln's Inn,
Easter Term, 1849*

PREFACE

TO THE ORIGINAL TREATISE.



IT is scarcely necessary to offer any apology for the publication of a new work on a subject which has only been treated by one learned writer, and that more than twenty years ago. The great extension, during the intervening period, of the subjects to which the relief by injunction is applicable, and the consequent addition to the collection of cases, illustrating the law on this head of equity, have appeared to the writer to make it probable that an Essay on the Law and Practice of Injunctions would now be acceptable to the profession.

The present work is confined strictly to an exposition of the law and practice.

The writer has not thought it advisable to include the usual accompaniment to practical works, viz. precedents of pleadings, forms of orders, and other similar matter; firstly, because such precedents and forms are already to be found in other works, particularly in the books of Practice, which are almost necessarily in the hands of every Chancery practitioner (*a*); and secondly, because, the

(*a*) For forms of orders, see practice; and for precedents of Seton on Decrees, and the books of bills, see 1 Equity Draftsman.

circumstances which give rise to injunction suits are of such endless variety, as to render precedents of bills and other pleadings nearly useless.

The new Orders of August, 1841, were not issued till after the whole of the work was printed. It does not appear, however, that those orders have any direct and special bearing on the practice in matters of injunction.

*Chancery Lane,
Oct. 1841.*

INTRODUCTION.

AN Injunction may be described as a prohibitory writ, issuing out of Chancery to restrain the defendant from using some legal right, the exercise of which would be contrary to equity and good conscience; or from doing some act inconsistent with the admitted or probable legal rights of the complainant, and with the due preservation of the property affected by the act sought to be restrained.

In practice, injunctions are of two kinds. An injunction of the first kind is grantable as an order *of course*, without reference to *merits*, upon the defendant's making default in appearing, or in pleading, answering, or demurring within the time prescribed by the practice of the Court(*a*). An injunction of the second kind is, on the contrary, always granted upon *merits*, and may, under circumstances, be granted at any stage of a suit, after the bill is on the file, without reference to whether the defendant has or has not made default.

An injunction of the first kind is properly called a *common injunction*, and is that which is most generally obtained in suits where the object of the injunction is to stay proceedings at law (*b*).

(*a*) 1 Newl. Pract. 324; 1 Smith's Pract. 601; and 10th Order, 1833; see also 2 Story's Eq. Jurisp. 177.

(*b*) To this circumstance, probably, it is owing that the common injunc-

tion is sometimes distinguished as that which is granted to stay proceedings at law. That is not, however, the true distinctive character of the common injunction. For though the

An injunction of the second kind is called a special injunction, because it is granted upon *special application*, and not as an order of course (*c*).

In practice the special injunction may be considered as subdivisible into two kinds, the first of which is grantable in certain urgent cases before appearance, and even without notice to the defendant, upon the merits shown by the *ex parte* statement of the plaintiff (*d*); and injunctions of this kind are called *ex parte* injunctions.

The second kind of special injunction is only granted upon the merits shown on both sides.

The *ex parte* injunction is frequently applied in cases of waste, infringement of patents and of copyright, and similar acts of injury to property, where delay might produce *irreparable injury*; and is not, except in a few rare cases of exception, applied to restrain proceedings at law (*e*). But all injunctions which are granted after answer, whether to restrain wrongful acts of a special nature, or to restrain proceedings at law or in other Courts, are made on notice, and on the special merits of the case, and fall therefore properly within the second class of special injunctions (*f*).

common injunction is never applied to stay waste and similar injuries to property; the special injunction is frequently applied to stay proceedings at law. The true distinction between the *common* and the *special* injunction is, that the former is obtained when the defendant has made default, as a common order, or *order of course*, to which no opposition can be offered, whereas the latter is always obtained on merits, and never as an order of course.

(*c*) 1 Newl. Pract. 335.

(*d*) 1 Newl. Pract. 335, 336.

(*e*) 18 Ves. 522, 2 Mer. 476; and see *Lane v. Williams*, 6 Ves. 798; see also *per* Lord Cottenham in *Thorne v. Hughes*, 3 My. & C. 753.

(*f*) The true special injunction has been defined by a learned writer to that which is granted before answer on the complainant's application, supported by an affidavit of merits, and he speaks of the injunction obtained after answer upon notice of motion, as the *ordinary* injunction.* Another learned writer on practice has treated

* *Index Treat. of Eq. Plead.* 68, 72.

I propose to consider the subject of Injunctions under three general divisions.

The first will comprise the discussion of the cases in which Equity will interfere by injunction to restrain a person from instituting or continuing judicial proceedings either in a Court of Equity, or in a Court of Law, or in some other Court neither of Law or Equity.

In the second will be considered the cases in which Equity interferes to restrain the commission of wrongful acts of a special nature, or acts inconsistent with the probable legal right of the complainant, and the due preservation of the property affected by the act sought to be restrained.

The third will be devoted to the consideration of the practice in obtaining, continuing, and dissolving injunctions.

As regards Injunctions for staying proceedings in Courts of Common Law and in other Courts, it may be stated as a general rule, illustrated by an abundance of case, that wherever a party by fraud, accident, or otherwise, has an advantage by proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity, to prevent a manifest wrong, will interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly

every injunction made upon *special application* (as distinguished from the injunction obtained of course on the defendant's making default), as a special injunction, whether made before or after answer.* This is also the classification adopted by Mr. Justice

Story in his excellent work on Equity Jurisprudence, vol. ii. p. 177. And I have adopted it in this work, not only as the most accurate, but because it is the most consistent with the ordinary acceptation of the terms used by the profession.

* Newl. Pract. 335.

gained (*q*). Mr. Maddocks, in his *Treatise on Chancery Practice* (*k*), states the doctrine broadly, that in most of the cases of accident, mistake, acquint or fraud, in which equitable relief is afforded, a party proceeding at law will be restrained. "In short," says that learned writer, "it seems that wherever relief would be given in a Court of Equity against a legal right, an injunction will be granted to restrain proceedings at law in respect of such legal right."

An examination of the cases will show this proposition to be, as a general one, sufficiently correct; but the inquiry, which is the special subject of the following sheets, is not so much into the cases in which a conclusion can be arrived at that general and final relief is grantable, and that therefore an injunction might be obtained, as into those, in which the case not being ripe for final adjudication, is yet of such a nature and in such a stage as to justify the preliminary interference of equity by injunction. Thus, so far as regards injunctions to restrain a party from instituting or pursuing judicial proceedings, I propose to examine under the following general subdivisions.

I. Where the legal title of the defendant in equity is founded originally on some inequitable transaction, or is against public policy; or where not having been originally inequitable, it has been tainted with fraud, actual or constructive, by the subsequent conduct of the party claiming under it.

II. Where the plaintiff in equity has some equitable right to set up against the plaintiff in the other Court, of which that Court cannot either by reason of want of jurisdiction, or by reason of its forms of proceeding, take

cognizance; or where the legal right of the plaintiff at law is coupled with and abridged by some equitable liability.

III. Where relief is sought against forfeiture or penalties incurred by the breach of covenants, or the neglect of other legal liabilities.

IV. Cases illustrating the principles and limits of the jurisdiction of equity to grant relief by way of injunction.

In discussing injunctions to restrain acts of a special nature, wrongful, or inconsistent with the preservation of the property in dispute, the subjects of consideration have been found to range themselves most conveniently under certain familiar heads of equitable jurisdiction, such as waste, copyright, &c. I have not therefore attempted in that part of the present work to classify the different cases to which the relief by injunction is applicable, otherwise than by reference to those established heads of equity; and injunctions to stay wrongful acts of a special nature will be considered under the following heads:—

Injunctions for restraining waste, and infringement of copyright, and of patent rights; to restrain the publication of secret inventions; the use of trade marks and designations; and nuisance; injunctions acting in aid of specific performance, by restraining the breach of agreements; and to restrain breach of actual or implied trust; injunctions in matters of partnership and bankruptcy, and in matters arising out of the relations between public companies and individuals; injunctions to assist the trial of legal rights by removing mere legal impediments; and injunctions in interpleader suits; and, lastly, certain cases of injunction, illustrating generally the nature and extent of the jurisdiction of equity.

In the Third Part I shall discuss the practice of the

Court of Chancery with reference, I. To the mode of obtaining both the common and the special injunction; II. To the extension of the common injunction to stay trial; III. To the effect on an injunction of amending the bill; IV. To what constitutes breach of an injunction and what are the consequences of such breach; and V. To the mode of dissolving injunctions.

Many points of practice will also be found discussed in other parts of the work, where they have incidentally arisen in the cases more immediately under discussion. These it has not been thought necessary to repeat in the part particularly appropriated to the discussion of the Practice.

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ERRATUM ET CORRIGENDUM.

P. 391, line 4, for "where it has"—read "where an objection has."

In p. 585 of the Treatise, the 46th General Order of 1729 should have been referred to, by which it is ordered, "That every application to stay proceedings upon any decree or order which is appealed from, be made first to the judge who pronounced the decree or order."

TREATISE

ON

INJUNCTIONS.

PART I.

OF STAYING PROCEEDINGS AT LAW AND IN OTHER COURTS.

CHAPTER I.

Of Injunctions to stay Proceedings at Law where the Legal Title of the Defendant in Equity, is founded originally on some inequitable Transaction ; or is against Public Policy ; or where, although the Legal Title of the Defendant in Equity may not have been originally inequitable, it has been tainted with Fraud, actual or constructive, by the subsequent Conduct of the Party claiming under it.

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| <ol style="list-style-type: none">1. Proceedings on Bonds or other Instruments obtained by Fraud.2. Gambling Transactions.3. Restraining Proceedings on Instruments affected with constructive Fraud.4. Jurisdiction to restrain Proceedings at Law on Instruments void at Law ; and Distinction between Illegality apparent on the Face of an Instrument, and Illegality appearing by Evidence dehors the Instrument. | <ol style="list-style-type: none">5. <i>Gray v. Matthias ; Simpson v. Lord Howden ; and Jones v. Lane.</i>6. Not necessary to show Certainty of the inequitable Foundation of an Instrument.7. Restraining Proceedings on Instruments founded on Expectations from third Parties, and concealed from them.8. Exception to this Rule.9. Restraining Proceedings on Instruments given by Persons having only Expectations. |
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| 10. <i>Interdict</i> . Quia Servant. <i>et</i> <i>huius</i> <i>modi</i> <i>Prohib.</i> | 16. <i>Effect of Fraud on the Party from whom the Instrument issues.</i> |
| 11. <i>Restoring Instruments on the ground of Fraud, either actual or Constructive.</i> | 17. (1) <i>Restoring Possessions in Favour of Insolvency.</i> |
| 12. <i>Prohibition Comparisons with Criminals.</i> | 18. <i>When Parties to Fraudulent Dispositions are permitted to sue in good faith their Rights in their own and their Equity.</i> |
| 13. <i>Mortgage Mortgagee's Rights and other Instruments involving the Title of the Land.</i> | 19. <i>General Principle of such Cases.</i> |
| A. <i>Where Equity intervenes.</i> | 20. (1) <i>The Effect on the Liability of Insurers of giving Time or other Advantage to the person Debtor, and of the Effect on the Creditor of the Contract of the Insurer.</i> |
| B. <i>Where Equity will assist the Debtor in their Rights in Land.</i> | 21. <i>The Burden of restoring a Party from among his Legal Rights, as against his Fraud as a Fraud on their Parties.</i> |
| 14. <i>General Principles arising from the State in this Head.</i> | |
| 15. <i>Contract and Indemnity as Fraud of the Equity Law.</i> | |

1. IF a party is proceeding at law on a bond, or other legal instrument, obtained by fraud, or by means of any inequitable transaction, a Court of Equity will in general interfere by injunction. Thus in a case where A., a foreigner, bound himself as surety in an obligation to pay money to B., another foreigner, in a foreign country, by the laws of which the person bound by such obligation could not be arrested, and afterwards both parties came to this country; and then A., being about to sail on a foreign expedition, was arrested by B., and, in order to procure his release, gave bills and executed other securities; B. was restrained by injunction from proceeding in actions upon the bills and securities so obtained; and Lord Loughborough, C., intimated an opinion that he should probably at the hearing set aside the bills (*a*).

So in a case before Lord Eldon (*b*), in which one of the defendants had taken from the other defendant in payment of a debt, a note for 5000*l.*, obtained from the plaintiff under circumstances of gross fraud, and the answer of the holder of the note was not clear as to the *bona fides* of the

(*a*) *Tallentire v. Blandings*, 3 Ves. 447. (*b*) *Jones v. White*, 7 Ves. 413.

transaction on his part; an injunction having been granted against the drawer, Lord Eldon continued it as against him, and extended it to the other defendant, the holder, ordering the note to be deposited in the hands of the Court till the hearing.

Again, in a late case upon a promissory note, which was taken when overdue, under circumstances affording strong grounds of suspicion against the taker, Sir L. Shadwell, Vice-Chancellor, restrained the defendant from proceeding at law upon the note (*c*). This order was afterwards, it is true, discharged by Lord Lyndhurst, Chancellor (*d*); but from the short note of his Lordship's judgment in Mr. Simons' report, the decision appears to have been put on the ground, that if the facts alleged were true, the question could be tried at law in a more satisfactory manner; and nothing appears to have fallen from his Lordship to impugn the doctrine of the Vice-Chancellor, that equity had *jurisdiction*, notwithstanding there might be a good defence at law. Where, however, by the facts in evidence, *dehors* the instrument itself, it does not appear that the holder had knowledge of the illegal origin of a bill, he will not be restrained from proceeding on it at law. This appears by a case which was decided by Lord Northington, and afterwards affirmed in the House of Lords (*e*). There a note was taken by a *bonâ fide* creditor, which was overdue, dishonoured, and not indorsed by the party from whom he took it: of the origin of the bill, however, it appeared that the holder knew nothing. It was held that he should not be restrained from proceeding on it at law, although the fact appeared by the pleadings, that the note was originally given to a broker in respect of illegal stock-jobbing transactions. But since it has been decided at law, that where a note is indorsed after it is due, and appears on the face of it to be dishonoured, it shall be left to the jury on the

(*c*) *Hodgson v. Murray*, 2 Sim. 515.

(*e*) *Dunbar v. Wilson*, 6 Br. P. C.

(*d*) 3 Sim. 283.

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slightest circumstances in pressure-traded (*f*), there can be but little advantage in coming to equity to restrain an action, in which the plaintiff at law must almost of necessity fail.

An injunction may be also granted to restrain proceeding under an agreement founded on a fraudulent representation. Thus where a patentee represented that his invention would enable a known article to be made of the ordinary description, so as to obtain from it some valuable product, while he knew and concealed the fact that a particular substance, not mentioned in the specification, must be used; such fraudulent representation was held sufficient ground for restraining proceedings under an agreement to purchase it (*h*), and for setting aside the agreement (*g*).

2. Before the 5 & 6 Will. 4, c. 41, bills and notes given in respect of a gambling transaction, were by the statute of Ann (*h*) absolutely void. But equity had jurisdiction to relieve against such instruments, and to decree repayment, if money had been paid under them (*i*); or to restrain proceedings at law, and to have them delivered up to be cancelled (*k*).

But, because equity has this jurisdiction, it does not follow that it will always interfere against a bill given for a gambling transaction. In general, in the cases in which a court of equity has interfered, it has been necessary for the plaintiff to come into that court for discovery, and for the purpose of connecting the instrument in question with the transaction on which its illegality is founded. And then, if the circumstances are suspicious, equity will restrain proceedings at law on the instrument, till they are better explained. Thus, where a party took a bill of exchange for valuable consideration, and it was alleged by

(*f*) *Boyes v. Davis*, 3 Term. Rep. 20, and *the same*.

(*g*) *Louis v. Jones*, 2 Y. & C. 49.

(*h*) 5 Ann. c. 41. s. 1.

(*i*) *Reade v. Shute*, 4 Anst. 209.

(*k*) *Newman v. Frowe*, 2 Anst.

519; *Anderton v. Frowe*, 3 Anst. 624.

the bill, and not denied by the answer, that the bill was originally given for a gambling transaction; and it appeared by the answer, that if the defendant did not actually know of the illegal consideration, he, at least, took the bill under circumstances of great suspicion and without inquiry, the Court sustained an injunction restraining him from proceeding on it at law (*l*).

So where the holder of bills was charged with having taken them without valuable consideration, and with notice of their having been originally given for gambling debts, and by his answer he denied the notice, and alleged generally, that they were taken by him in consideration of debts due for business, but did not set forth any particulars of such debts, and said he had no papers relating to them; an injunction was granted till the hearing, the plaintiff paying the amount of the bills into Court (*m*).

But in a late case in the Exchequer, on a motion to dissolve an injunction to stay proceedings at law upon an I. O. U., the answer stated, that the defendant was a paid attendant at a gambling-house in Paris; that he lent money to the plaintiff in one of the rooms of the gambling-house; that he did not know whether the plaintiff applied it for the purpose of gaming; and that it was not lent for any particular purpose; the Court said there was not enough for it to proceed upon, and dissolved the injunction (*n*).

If the illegality appears at law the Court will not interfere; thus, in *Graves v. Houlditch* (*o*), where the case was that the plaintiff indorsed a bill given for a gambling debt, and the holders sued on it at law, and failed on the defence that the bill was given for a gambling debt; afterwards the plaintiff accepted another bill in favour of the same holders, in consideration of their giving up the original bill, and he then suffered judgment at law by default on

(*l*) *Lord Portarlington v. Soulby*,
3 Myl. & K. 104.

(*m*) *Wynne v. Jackson*, 2 Russ. 351.

(*n*) *Wilkinson v. L'Eaugier*, 2 Y.
& C. 363.

(*o*) 2 Price, 147.

the said bill: the Court of Exchequer held that he had no equity for an injunction, as he would have had at law on the second bill, if he had not let judgment go by default, the same defence as on the first.

The law has received a material alteration as to bills and notes given in consideration of gaming transactions, by the 5 & 6 Will. 4, c. 41, which repeals the provision above referred to of the 9 Anne, and enacts, that such bills and notes, instead of being absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed *for an illegal consideration*.

3. Where a person takes a bill drawn in the name of a firm by one of the partners, who by the partnership articles is expressly restricted from drawing bills in the name of the firm, and the holder fails to prove that it has been represented to him that the bill was the bill of the firm, he will be ordered to deliver it up (*p*). And where an executor holds promissory notes made to him as executor, and showing that fact upon the face of them, a party, who takes those notes in a transaction inconsistent with the due administration of the testator's assets, renders himself liable to the consequences of the *devastavit*. Thus where bankers took such notes from an executor, as a security for advances for the purpose of carrying on his own trade, they were restricted from proceeding against the maker of the notes, and that, although they had not themselves seen the notes before they made the advances; but their agent had; and the Court held, that notice to their agent was notice to the principal (*q*). But where A., having constant dealings under a power of attorney from B. with C. and D. bankers, drew a check on another bank, and got from C. and D. a bill for the amount, and then indorsed it in the name of B. to E. who sold it to the defendant, and it turned out that A. had no effects at the bank on which the check

(*p*) *Neaves v. M'Intosh*, 2 Ves. jun. 483.

(*q*) *Dunster v. Paine*, 2 Ball & B. 471.

was drawn, but neither B. nor E. had any knowledge of the fraud; E. afterwards procured B. to indorse the note, and then brought his action upon it against the assignees of C. and D.; on this state of things the action was restrained till the hearing.

At the hearing, the Court seems to have thought that if the indorsement to the defendant by the attorney, had been a good indorsement, the bill must have been dismissed, as there was no fraud in the purchaser of the bill: But, by the terms of the power of attorney, the Court was of opinion that the attorney had no power to indorse the bills; that, therefore, the defendant was not a holder of the bill, and, as a necessary consequence, he was not a *bonâ fide* transferee of the bill; on this ground the Court decreed the bill to be delivered up (*r*).

Where several persons become sureties for a sum of money, each in a separate bond for his proportional share of such sum, there will be a liability between them as sureties, even against the intention of the parties (*s*). But if the transaction is such as to show that each is a surety by a distinct and separate transaction, and that it is not in fact the same transaction split into different parts, one of the sureties, who has executed his security, is bound, although another of the intended sureties may not have executed his; and the Court will not interfere to restrain the obligor from proceeding on that one of the separate securities which has been executed (*t*).

At first sight there is considerable apparent similarity between the two cases referred to, but it will be found that there is in fact a solid distinction. In *Dering v. Earl of Winchelsea*, there were, it is true, separate bonds, each for 4000*l.*, but all were subject to the same condition, viz. they were all conditioned for the due performance of

(*r*) *Esdaile v. La Nauze*, 1 Y. & C. 394.

Cox, 318; and see per Lord Eldon, T. & R. 429.

(*s*) *Dering v. Lord Winchelsea*, 1

(*t*) *Coope v. Twynam*, T. & R. 426.

Dering's duty as a collector of customs. It was therefore one barthen, and one transaction.

In *Cope v. Tregum*, the agreement was that A., B. and C. should be security for the payment to Twynham of such sum, not exceeding 1200*l.*, as should be found due to him from Bruce on taking an account; and that the security should be given by one bond from Bruce and A. for 400*l.* payable at a given day; another bond from Bruce and B. for 400*l.* payable on another day, and a third from Bruce and C. payable on a third day. The transaction was therefore *bond fide* composed of three distinct obligations.

4. In *Jerrard v. White*, and *Hodgson v. Murray*(*u*), the jurisdiction of the Court was called in question. In the former case, the note had been negotiated while the order for an injunction was being made, and the holder of the note had brought his action, before the motion to extend the injunction to him. It was insisted for him, that the Court had no jurisdiction to withdraw from a jury, a question already the subject of an action. But Lord Eldon said, "I do not admit that this Court will not examine the facts of the case with a view to determine whether relief shall be administered or not, merely because an action may be maintained. I agree, when the discovery is obtained, if the facts are contradictory, a judge sitting here would act rashly if he should not desire the assistance of a jury; and if matter of law arises, unless it is very clear, he ought to take advantage of the assistance he can have as to that. But if the facts and law are indisputably clear, I cannot admit that it is not within the jurisdiction of this Court, and the due application of those circumstances, to act not only without sending them, but without allowing them to go, to law. At the hearing, the Court will determine whether an action ought not to be tried, but is not bound till the hearing (*r*)."

In *Hodgson v. Murray*, it was urged for the defendant that the plaintiff might have availed himself in a court of law of the circumstance that the bill was over-due, and that, therefore, the case being one in which that Court could do complete justice, the plaintiff had no right to apply to the Court of Chancery for its extraordinary interference. But to this the Vice-Chancellor answered that, although a court of law might not allow the defendant to recover on such a note, that was no reason why the Court of Chancery should be deprived of its jurisdiction (*y*).

On this point, viz. the jurisdiction of equity to interfere against instruments which cannot be proceeded upon at law, there is however a distinction to be observed; where the illegality appears by the instrument itself; and where it depends on evidence *dehors* the instrument. It is said, that Lord Thurlow denied the jurisdiction altogether in a case referred to in *Colman v. Sarrel* (*z*). In *Franco v. Bolton* (*a*), Lord Loughborough allowed a demurrer to a bill for an injunction, and for delivering up a bond alleged to have been given for future cohabitation, on the ground that the necessity for the interposition of equity was entirely taken away, when all that matter that would avoid the bond might be pleaded at law. And Lord Thurlow appears, in a case of *Ryan v. Mackmath* (*b*), to have inclined to this view. But the same learned judge, in a subsequent case (*c*), expressed an opposite opinion. In that case, a bond had been given to a trustee, and it appeared that it was for the benefit of a party who had resigned a public office, and upon whose resignation the obligor had been appointed to such office; so that although the illegality of the consideration was not clear upon the face of the bond, a strong inference arose that it was bad, as being given in consideration of an appointment to a public office. The

(*y*) See *ante*, p. 3, as to the effect of Lord Chancellor's order in this case.

(*z*) 1 Ves. 50; see p. 51.

(*a*) 3 Ves. 368.

(*b*) 3 Br. C. C. 15.

(*c*) *Thrle v. Ross*, 3 Br. C. C. 57.

Lord Chancellor dissolved an injunction which had been obtained before the coming in of the answer, leaving the question, whether the consideration was corrupt, to be tried at law. But his Lordship expressly guarded himself against its being understood, that the Court would not set aside a bond on account of a corrupt consideration, only because it might be made the subject of a defence at law. So, although the defendant should have obtained a verdict in an action brought on bills of exchange, which of course would furnish a defence at law, yet he is not therefore deprived of his equity to have them delivered up; and will have an order for delivering them up to be cancelled, and a perpetual injunction to restrain proceedings at law (*d*). And in *Jackson v. Mitchell* (*e*), a bond appearing to be bad at law, by matter *dehors* the instrument, was ordered to be delivered up by the holder.

It is now, in fact, well settled by a great preponderance of modern authorities, that where the illegality of an instrument does not appear by the instrument itself, but depends on evidence *dehors*, equity will interfere by injunction, and if necessary by ordering the instrument to be delivered up to be cancelled (*f*).

5. But that equity will not interfere, where the illegality appears on the face of the instrument, was decided in *Gray v. Mathias* (*g*) by the whole Court of Exchequer, on a bond appearing on the face of it to have been given *pro turpi causa*; and the rule has since been confirmed, on great consideration, by Lord Cottenham, C., in a case in which all the authorities were most elaborately analysed by his Lordship. I allude to the case of *Simpson v. Lord*

(*d*) *Mathias v. Jones*, 3 L. R. C. C. 16, note 4; *Lake v. Lake*, 3 Ans. 649.

(*e*) 13 Ves. 581.

(*f*) *Payne v. Fearn*, *Byne v. Patten*, *Bromley v. Holland*, 5 Ves. 604, 606, 619; *Bromley v. Holland*, 7 Ves.

3; and see pp. 16 to 22. See also *Huntford v. Dunstable*, 17 Ves. 111; and the observations of Sir John Leach, M. R. in *Granger v. Huggell*, 3 Ross. 432; *Jones v. Lane*, 3 Y. & C. 281. (*g*) 5 Ves. 266.

Howden, in which a demurrer was put in to a bill for an injunction, to restrain proceedings at law on an instrument, the illegality of which, if it was illegal, appeared on the face of the instrument itself. Lord Cottenham, after reviewing the authorities, said: "If then there be no case in which this jurisdiction has been exercised, and if I find Lord Thurlow in the case referred to in *Colman v. Sarrel*, and the Court of Exchequer in *Gray v. Mathias*, deciding against it; Lord Alvanley, in *Bromley v. Holland*(*h*), regretting that the jurisdiction had been assumed in the cases of annuities, and Lord Eldon, in the same case directly (*i*), and in *Ware v. Horwood*(*k*) inferentially, disclaiming the jurisdiction contended for, it only remains to be considered, whether any such cogent reason exists in the present case, as to make it my duty to assume the jurisdiction, and so for the first time to establish a precedent for it." And his Lordship,—on the ground that all that would be done by a decree in equity, would be to order the instrument to be delivered up; that the same questions must be raised at law, as were raised by the bill; and that if the plaintiffs in equity obtained a verdict at law, and the illegality of the instrument was established, their whole object would be obtained,—allowed the demurrer(*l*).

The doctrine on this distinction, is thus clearly summed up in *Jones v. Lane*(*m*), by Alderson, B.: "The result of an examination of the authorities seems to be, that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at law, equity will nevertheless interfere, if, from lapse of time or death of witnesses, such defence is likely to fail; but that, if the objection, being apparent on the face of the instrument, must always be open to the defendant, whenever such action shall be brought against

(*h*) 5 Ves.(*i*) 7 Ves.(*k*) 14 Ves. 28, *vide* p. 32, 33.(*l*) *Simpson v. Lord Howden*, 3 Myl. & C. 97.(*m*) See 3 Y. & C. 294.

him, he is not entitled to apply to a Court of equity for relief."

But it is necessary, in order to justify the interference of equity, that the two incidents should co-exist—of wrongful possession of the instrument, and the resting of the defence at law, on circumstances the proof of which is *dehors* the instrument, and liable to be lost. In the case referred to⁽¹⁾, the indorsee of the bill had received it after action brought on it, and with full knowledge of that fact, and under such circumstances the Court was of opinion, that equity might interfere by injunction, although in action, it seems, could not be brought on; Because the defence at law would rest on the express notice of the action previously brought; and of the proof of that notice, time and the deaths of witnesses might deprive the acceptor. The decision in *Jones v. Lane* was, however, ultimately against the injunction, on the ground that the possession of the indorsee was not wrongful.

The Court will open a solicitor's bill after security given and even after payment, if the client can point out in the bill gross errors, and charges amounting to *imposition and fraud*; but if nothing can be made out against the solicitor but a trifling inaccuracy, and no fraud, imposition, or material error is established, proceedings at law upon a bond given by the client, will not be restrained merely because business was still going on when it was given. (p)

6. And here it may be observed, that in regard to staying proceedings at law under unlawful instruments, the Court does not require *certainly* of the unlawful foundation of a security, to justify its interference; but if, upon the answer, it sees sufficient to raise a great degree of doubt whether the consideration of the instrument is lawful, although

(1) *Jones v. Lane*, 3 Y. & C. 281. p. 291.

(2) *Columbier or Columbiar v. Sten*, (3) *Cook v. Setree*, 1 Ven. & Bal. cited by the Court in *Jones v. Lane*. 126.

there is no actual evidence that it was not so, the Court will restrain proceedings at law until it is in a position to come to a conclusion as to the rights of the parties. (*q*)

7. Under the head of fraud, may be considered the cases where parties have been restrained from enforcing at law, instruments founded on or having relation to expectations from third parties, where the Court has considered it probable that, had the transaction been known to those from whom the benefits were expected, the abandonment of the arrangement would have been made by such parties a condition of the realization of the expectations. Thus in *Woodhouse v. Shepley*, (*r*) a woman, who had expectations from her father to the extent of 500*l.*, was induced by a man who paid his addresses to her, to give him her bond, conditioned to pay him 500*l.* if she did not marry him within thirteen months from the death of her father, and he gave her a corresponding bond. The transaction was kept secret from the father, who disapproved and forbade the marriage; the father died, bequeathing to his daughter 340*l.*, and then she suffered the thirteen months to elapse, and filed her bill to be relieved against the bond. Lord Hardwicke ordered it to be delivered up, notwithstanding the mutuality, chiefly on the ground of its being a fraud on the father, who thought his child had submitted to his opinion of the match, and in that opinion made a provision for her to advance her in marriage, which, had he known of the bond, he would not have done, or might have done in such a manner as would have prevented the marriage; and his Lordship compared it to the case of bonds given before marriage to return a part of the portion.

So in *Cock v. Richards*, (*s*) the plaintiff had given a bond to the defendant, that in case he did not marry her within a year after the death of his master, from whom he

(*q*) *Earl of Milltown v. Stewart*,
3 Myl. & C. 18.

(*r*) 2 Atk. 535.

(*s*) 10 Ves. 429.

had expectations, then he should pay her 2000*l.* The Court restrained the defendant from proceeding at law on the bond until the hearing, as it appears, on the following grounds: that it was doubtful whether such a bond could be supported, as being against public policy; that there was no mutuality, the defendant not being bound to marry the plaintiff; and that the arrangement was kept secret, and made in contemplation of anticipated benefits from the plaintiff's mother.

8. An exception to this rule has been made in a case where a person, being on bad terms with his father and not admitted to his presence, on a treaty for the marriage of his daughter with an infant, gave a bond, conditioned to settle on his daughter and the issue of the marriage, if the marriage took place, a third of the estate that should come to him from his father, within one month after his death. (1) The Court put it on the ground that it was an agreement made for valuable consideration, and therefore fit to be executed in equity. And it is to be observed also, that there was no allegation of concealment of the marriage from the father, and the marriage taking place before his death, there was no ground to *presume* a continuing concealment from him.

There is, however, nothing inequitable or against public policy, in an agreement between parties who have expectations from a third party, to divide whatever such party may leave them. Thus in an early case, (2) where two partners marrying two sisters agreed that whatever the father-in-law should leave to either of them should be equally divided, the Court held that such an agreement ought to be carried into effect. And in a later case, the plaintiff and defendant both had expectations from William Tooke, and agreed by parol to share equally what he might leave them: on his death he left

(1) *Holmes v. Tresser*, 2 P. Wms. 191. 182; and see *Holmes v. Tresser*, 2 P.

(2) *Buckley v. Newland*, 2 P. Wms. Wms. 191.

a much larger portion of his property to the plaintiff than to the defendant, who agreed with the plaintiff to receive a promissory note for 4000*l.* in satisfaction of his claim, and afterwards indorsed the note to another person in consideration of an annuity. The plaintiff then filed his bill for delivery of the note, and to restrain any proceedings upon it. The Court on the motion granted an injunction, on the amount of the note being paid into Court, but at the hearing dismissed the bill, and the decree was afterwards affirmed on a petition of rehearing (*v*). The Court therefore in effect decided, that the original agreement was good.

9. In regard to bonds or other securities founded on expectations, or given by persons having no present property, and only expectations from persons living, it is a settled principle that the Court will restrain proceedings at law upon such instruments, unless the actual value has been given; and therefore in a case where a person was eighty-two years old, and his three sons, all between thirty and forty, borrowed 1000*l.*, and gave a bond for 2500*l.* on the death of the father, if one of the sons was then living, the Vice-Chancellor granted an injunction, on the ground that the sum paid was not the actual value of the bond (*x*). A purchaser, however, at a sale *by auction* of a reversion, is not of necessity bound to establish that he purchased at a full price (*y*). But if the sale is so conducted as to show on the face of it, that the vendor is in the power of those who deal with him, as where a young man, about to raise a sum of 4000*l.* upon *post obit* bonds, payable at the death of his father, put them up to sale, the particulars showing that the sale was to take place without any reserved bidding on his part; the Court thought that under such circumstances, the sale by auction did not afford fair evidence of the market price, and granted an injunction.

(*v*) *Harwood v. Tooke*, 2 Sim. 192.

(*y*) *Shelly v. Nash*, 3 Mad. 232.

(*x*) *Marsack v. Reeves*, 6 Mad. 108.

tion till the hearing, the plaintiff paying into Court the auction price, with interest at five per cent. from the time of payment (c).

It is indeed well settled as a general doctrine of equity, that to persons in the position of an expectant heir, a degree of protection is extended, approaching nearly to an incapacity to bind themselves by any contract, and that it is incumbent upon those who have dealings with expectant heirs relative to their reversionary interests, to make good the bargain, that is, to be able to show that a full and adequate consideration was paid (d). And while the pressure of the distress, which induced originally the expectant heir to enter into the contract, continues, no length of acquiescence, nor even confirmation, will prevent such heir from coming to equity to set aside the contract (e).

10. But the extraordinary protection of equity must be withdrawn if it shall appear that the transaction was known to the father or other person standing *in loco parentis*, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him; and further, if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it, so as to alter the situation of the other party or his property: at least, if he does so, the proof lies upon him of showing he did so under the continuing pressure of the same distress which gave rise to the original dealing.

These restrictive propositions were laid down upon a review of the authorities by Lord Brougham, C., in *King v. Hamlet* (c), a case which first came before Sir L. Shad-

(c) *For v. Wright*, 6 Mad. 111.

(d) *Gonzales v. Defaria*, 17 Ves. 29;

(e) 1 Br. C. C. 9, 9 Ves. 246;

Crane v. Ballard, 3 Br. C. C. 117.

Pennell v. Ewart, 16 Ves. 512, *G-*

(c) 2 M. & K. 456.

and v. Defaria, 17 Ves. 29.

well, V. C., upon a motion for an injunction. Upon the evidence then before the Court, it appeared that the plaintiff, who was the expectant heir of Lord Lorton, and entitled to a life interest in certain estates after the death of his father, being under pecuniary embarrassments, applied to the defendant, who was a jeweller, for a loan of money; that ultimately, there was no loan of money, but the plaintiff took goods from the defendant's shop at the shop prices to the amount of 8000*l.*, for which he conveyed as a security, all his expectant life interest in the estates in question by a deed of mortgage, which on the face of it purported to be for a debt of 8000*l.* The plaintiff further insured his life in the name of the defendant, covenanting to pay the premiums of insurance. It appeared that the father of the plaintiff and friends and connexions of his family were informed of the fact that pecuniary negotiations were going on between the plaintiff and the defendant, but they believed that the transaction was a loan of money, and were not at all aware that the advance was to be in the shape of goods. The defendant alleged that the transaction was simply a sale of goods, and that he did not know the plaintiff's object was to raise money by means of them. But the Court, it is clear, treated this allegation as inconsistent with the rest of the evidence. The plaintiff placed the goods in the hands of an auctioneer in pledge for an advance of money, and they were afterwards sold by auction for 3482*l.*; and, after deducting 10 per cent. for the auctioneer's commission, and 400*l.* for the costs of preparing the securities and certain other charges, the plaintiff realized only a net sum of 2730*l.* His Honor the Vice-Chancellor, after stating and commenting upon the facts, and particularly on the circumstance that Lord Lorton had not been aware of the true nature of the transaction, said, that the defendant and his agents must have known that the object of the plaintiff was to raise money by means of the goods; and treated the sale by the auctioneer as the sale of the defendant, on the principle of

Barker v. Vansumner (d), and restrained the defendant from taking proceedings against the plaintiff, or disposing of the securities, the plaintiff paying into Court or to the defendant the 270*l.* and the 400*l.* (e).

The order for an injunction was affirmed by the Lord Chancellor upon the same evidence; but afterwards at the hearing of the cause, the depositions showed, 1st, that the plaintiff's father and friends had been aware not only that the son was dealing with his expectancy, but that the transaction was a security for goods, and not a loan of money; 2dly, that when the plaintiff by allowing the goods to be sold by auction, so dealt with them as to put it out of his power to restore the defendant to his original position, he was not continuing under the same pressure of distress which existed at the origin of the transaction, but that his father had then come to his rescue, and that he was in a condition to restore the goods; and upon this state of facts his Lordship dismissed the bill.

11. Under this division also falls the class of cases where instruments are obtained under undue influence. In those cases equity will restrain the parties claiming under the instruments so obtained, from proceeding at law. Thus, though a voluntary gift will not be disturbed by the Court merely as such, where it is *bonâ fide*, yet where a solicitor allowed an annuity to be granted to his wife by his client, under circumstances showing that the client was under undue influence on the part of the solicitor, the latter was restrained from enforcing the payment of the annuity at law, all the Barons of the Exchequer concurring (f).

So where the execution of a deed by a married woman has been obtained by the husband under circumstances of harshness and illtreatment, such as to induce the Court to come to the conclusion, that although she might appear

(d) 140. C. C. 449.

(e) 4 Sim. 221.

(f) *Guillard v. Carleton and others*,
9 Price, 169.

to be acting voluntarily, she was not a free agent, the Court will restrain the grantee from acting upon such deed, and will direct an issue to try the validity of it (*g*). And if on the trial of the issue it is found that the deed was obtained by duress, it will be set aside (*h*).

Equity will interfere against a deed or an agreement entered into by a party while in a state of intoxication, if any unfair advantage has been made of his situation (*i*), or if there has been any contrivance or management to draw him into drinking (*k*), or even over-readiness to acquiesce in and countenance his disposition to drink (*l*), or perhaps if upon the face of the agreement it appears that the offer was such, as necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting, it (*m*). Thus in *Dunnage v. White* (*n*), the Court refused to carry into effect a deed of arrangement between the members of a family, principally on the ground that one of the parties was habitually given to intoxication, and was ignorant, and incapable of understanding his legal rights without professional assistance, although he was sober at the particular time of executing the deed; the deed showing on the face of it that his rights were therein misrepresented. The Court said such habits, though not constituting absolute incapacity, lay a ground for a strict examination whether the instrument contains in itself evidence that advantage was taken of them. And to the same effect is the case in the House of Lords, already referred to (*o*). There one Brady, a tenant of Butler, under a renewable lease, had allowed the lives to drop without renewing, and was indebted to

- (*g*) *Lady Strathmore v. Bowes*, 2 130, n. A.
Br. C. C. 345. (*l*) *Say v. Barwick*, 1 V. & Bea.
(*h*) *Ibid.*; *Peel v. —*, 16 Ves. 195.
157. (*m*) See the observations of Sir W.
Grant in *Cooke v. Clayworth*, 18 Ves.
(*i*) *Cory v. Cory*, 1 Ves. sen. 19, 17.
and see the cases there cited; *Butler*
v. Mulvihill, 1 Bligh, 137. * (*n*) 1 Swanst. 137.
(*k*) *Johnson v. Medlicot*, 3 P. Wms. (*o*) *Butler v. Mulvihill*, 1 Bligh, 137.

Butler in a considerable sum for arrears and renewal fines. On a negotiation for a renewal of the lease, Brady alleged that he could hold by reason of the Statute of Limitations, but was willing to treat for a renewal. It was proved that at a meeting for that purpose, Brady offered to commute the arrears by an advanced rent, and to give 200*l.* a year. And he afterwards obtained a lease from Butler, while the latter was in a state of stupor-intoxication, in which lease the rent reserved was only 100*l.* a year. It was proved that at the meeting when the lease was obtained, a professional man was called in, but that he refused to interfere or look at the lease, on account of the state of intoxication of Butler, and remonstrated with Brady, and cautioned him against obtaining a lease from a man in the condition in which Butler was. On this state of facts the House of Lords declared the lease void, as having been obtained by fraud and imposition (*p*).

It is to be observed, that the principle of that decision is not merely that the party was actually intoxicated, but that the fact of his being intoxicated, taken in conjunction with the fact of the rent actually reserved being grossly inadequate, and different from that previously agreed upon, affords an inference of fraudulent advantage taken of the intoxication of the plaintiff. For as to intoxication *simpliciter*, it is settled that equity does not interfere against an instrument, merely on the ground of the party being intoxicated at the time of executing it (*q*). In the case of *Cooke v. Clayworth*, the plaintiff appeared to have executed a document originally written as an agreement, and afterwards altered so as to amount to a demise to the defendant, while in a state of intoxication, and the balance of evidence was against the presumption that he was by contrivance and management drawn into drink; or that any unfair advantage was taken of his intoxication to obtain an unreasonable bargain. Sir William

(*p*) 1 Bleg. 137.

130, n. A., and *Cooke v. Clayworth*,

(*q*) *Johanny v. Mellor*, 3 P. Wms. 18 Ves. 12.

Grant, M. R., dissolved an injunction which had been granted to restrain the defendant, the lessee, from proceeding in an ejectment (r).

12. In cases where persons having entered into a general arrangement with creditors for a composition, have entered at the same time into a secret arrangement with certain creditors, the effect of which would be to give them a superiority over the general mass of creditors, and to defeat the presumed intention of the general body, viz. that they shall all receive equally, and that the debtor, after the payment of the composition, shall be free; equity will prevent such agreement, made in fraud of the intent of the general creditors, from taking effect. In *Eastabrook v. Scott* (s), the debtor had privately given bills and promissory notes to certain creditors, who represented their debt at the meeting of creditors to be less than it really was, for the purpose of securing to them their debt in full. The bill was filed by one of the creditors who executed the general deed and by the debtor himself, against the holders of the bills and notes. Sir R. Arden, M. R., ordered the bills to be delivered up, and restrained the defendants from putting the notes in suit, until it should appear whether all the trusts of the composition deed would be satisfied; but, on account of the fraud of the debtor, reserved the question whether the holders of the bills and notes should have the benefit of them, after satisfaction of the trusts. In *Mawson v. Stock* (t), the same point arose in a different form—there the debtor brought an action to recover from the creditor claiming under the secret agreement, the balance arising from certain bills given by the debtor, over and above the composition to which such creditor would be entitled under the composition deed; and then the creditor filed his bill for an injunction to restrain the action. But the

(r) *Cooke v. Clayworth*, 18 Ves 12.

(t) 6 Ves. 300.

(s) 3 Ves. 457.

Court refused to grant an injunction, not on the ground of any equity in the defendant, but upon the ground that the policy of the law did not sanction an agreement of that kind, made secretly in fraud of the interests of the other creditors. Lord Eldon said, "It is impossible to deny that where a large body of creditors, principally consisting of bill holders, having a right to apply not only to the common debtor but also to the others, all enter into a deed of composition, on which all on the face of it agree to accept 8s. in the pound in absolute discharge of their demand, it is not competent to a particular description of creditors to go into another room, and say that with the debtor they make a fresh arrangement for their benefit. That though they have absolutely discharged him in the presence of the others, yet by the separate agreement they will hold him so engaged to them that they shall receive 20s. in the pound, and so to bring upon him the claims of others; from whom they received that, though the other creditors think him absolutely discharged. That is a fraud upon the policy of the law and upon the other creditors; a fraud upon third parties, of which it has been uniformly held that the debtor may take advantage."

13. I. Under this head are to be considered several cases of a mixed nature, in which the vice of the transaction consists, partly in its being fraudulent as against individuals, and partly in its being inconsistent with public policy. Of this kind are what are called marriage brokerage bonds (u); bonds or other securities given in consideration of obtaining places in the public service (x); or for

(u) *Drew v. Hamb.*, 1 Vern. 212; *Arundell v. Trevilian*, 1 Ch. Rep. 47; *Williamson v. Gilan*, 2 Sch. & Lef. 357; *Smith v. Denning*, 2 Vern. 392.

(x) *Hastwell v. Hartwell*, 4 Ver. 811; *Threlk v. Rait*, 3 Br. C. C. 57;

Hannington v. Duckett, 1 Br. C. C. 124; *Spencer v. Gilson*, 2 Vern. 308; *Whittingham v. Bergmyer*, 3 Ast. 989; *Morris v. McCulloch*, Amb. 432.

the exercise of influence over others in the disposition of their property (*y*); or for other objects fraudulent in intention, and mischievous in policy.

The general rule in this sort of case is, that the party claiming under a title thus tainted, shall be restrained in equity; although in some cases which we shall shortly consider, the Court has proceeded on the principle of not interfering, and leaving the parties to do the best they can respectively at law.

In a case where A., in consideration of B. obtaining for him a place in the excise, gave a bond for payment of 10*l.* a year as long as A. should continue in his office, the Lord Chancellor ordered the bond to be delivered up, and granted a perpetual injunction, with costs, on the principle that such engagements were a fraud on the public, and would occasion corruption and extortion in offices, by having the profits of places separated from the places themselves (*z*).

So in another of the cases above referred to (*a*) Lord Hardwicke ordered a bond to be delivered up, which had been given by the plaintiff to the defendant's wife, in consideration of her using her influence over the plaintiff's grandfather, who was an old man, to procure him to make a will in favour of the plaintiff. His Lordship put it partly on the ground of public policy, and partly on that of undue consideration (*b*).

With respect to transactions falling under the head of marriage brocage, although the general rule has been long

(*y*) *Debenham v. Or*, 1 Ves. sen. 276; *Keat v. Allen*, 2 Vern. 588.

(*z*) *Law v. Law*, 3 P. Wms. 390; see also *Hannington v. Duchatel*, 1 Br. C. C. 124; *Morris v. M'Culloch*, Amb. 432.

(*a*) *Debenham v. Or*, 1 Ves. sen. 276.

(*b*) See also on this subject *Smith v. Aykwell or Haytwell*, 3 Atk. 566; Amb. 66; *Drury v. Hooke*, 1 Vern. 412; *Stribblehill or Scribblehill v. Brett*, 2 Vern. 445; 4 Br. P. C. 144; *Hall v. Potter*, Show. Parl. C. 76; *Cole v. Gibson*, 1 Ves. sen. 503; *Turton v. Benson*, 1 P. Wms. 496.

well settled, there have been some differences in the decision as to the precise ground of interference (c).

In *Drury v. Hooke* (d), the case was, that the marriage was brought about without the consent of the young woman's parents, who were living, and the Lord Chancellor, for *that reason alone*, decreed bonds given for procuring the marriage to be delivered up and a perpetual injunction, and said there was a material difference where the parties were at their own disposal, and where the parents were living.

In *Striblehill or Scribblehill v. Brett* (e), the case was to set aside a lease alleged to have been granted for procuring a marriage. It appears that that fact had been tried and negatived by two verdicts at law, and therefore the bill was dismissed. But on appeal to the House of Lords (f) the lease was declared null. Mr. Vernon, in his report of this case, states that the reversal of the decree was without regard to the verdicts. But this seems wholly improbable. Because in the Court below the doctrine was not disputed, that if the lease had been gained by fraud or an unjust consideration, it would be void, and the decree was against the bill on the special ground, that the *fact of fraud was negatived*. The House of Lords therefore could only reverse the decree, on the ground of the facts being otherwise than as they were found by the verdicts. In *Hall v. Potter* (g), in which the testator of the appellant paying his addresses to a lady, gave his bond to respondent's husband, to pay 500*l.* in ten days after his marriage, in procuring which respondent's husband assisted, the bond was ordered to be delivered up, on the ground, it seems, that marriages should be by mediation of friends and relations, and not of hirelings.

(c) See *Smith v. Aykwell or Havtwell*, 3 Atk. 566; Amb. 66; and the cases cited *ante*, p. 22, n. (u).

(d) 1 Vern. 412.

(e) 2 Vern. 445.

(f) 4 Br. P. C. 144.

(g) Show. Par. C. 76.

In *Cole v. Gibson* (*h*) Lord Hardwicke expressed the general doctrine, that in a case where a person having influence over a lady, enters into a contract to exercise his influence over her for a recompense, such contract will be set aside, not for the sake of the particular interest of the person, but of the public; and his Lordship intimated that subsequent confirmations even by both husband and wife would not rectify it.

The Court has gone so far in transactions of this nature as to hold, that even though there should have been no treaty or actual stipulation to connect the giving of the bond with the marriage brokerage transaction, and no allegation in the bill to that effect, yet if the fact should appear by the answer, that the defendant had actually assisted the plaintiff in obtaining the marriage, and the bond has been given as a reward *for that service*, the Court would consider such a bond as in the nature of a marriage brokerage bond, and restrain proceedings on it (*i*).

It was held in an early case, at a period when such bonds were not thought in themselves unlawful, that if a patron of a living made use of a bond given by a parson to resign, oppressively, as for instance to prevent him from demanding tithes in kind, a perpetual injunction would be granted (*k*).

II. The cases in which equity has refused to interfere have been principally those arising on conveyances made in order to give to a party a colourable qualification, to enable him to sit in parliament, or to kill game. The doctrine in these cases is laid down in a case cited by Lord Eldon in *Curtis v. Perry* (*l*), in *Platamone v. Staple* (*m*), and in *Brackenbury v. Brackenbury* (*n*). From

(*h*) 1 Ves. 503.

Ab. 86.

(*i*) *Cotton v. Catlyn*, 2 Eq. Ca. Ab. 525; *Williamson v. Gihon*, 2 Sch. & Lef. 357.

(*l*) 6 Ves. 747.

(*m*) Coop. 250; and see 9 Anne, cap. 5.

(*k*) *Durston v. Sandys*, 1 Eq. Ca.

(*n*) 2 Jac. & W. 391.

the case cited in *Curtis v. Perry*, and the case of *Platamone v. Staple*, it is to be collected that the Court will require the fraud to have been effected, that is, the colourable qualification to have been actually used for the fraudulent object for which it was intended, in order to displace the equity of the grantor. The case referred to in *Curtis v. Perry* is thus stated, "In the case of a bill filed to have a conveyance of a qualification given by the plaintiff to his son, to enable him to sit in parliament, *the purpose being ascertained*, the bill was very properly dismissed by Lord Kenyon, with costs (p). In *Platamone v. Staple*, a rent-charge was granted to give the defendant a colourable qualification to sit in parliament, but the defendant never became a candidate. On this ground the Court, admitting the general doctrine, that equity will not relieve against a deed made in fraud of the policy of the law, held that there was no ground against the plaintiff's equity upon the statute as a fraud on the law, or as being against public policy, and granted an injunction (q).

But the expressions of opinion which fell from the Court in *Curtis v. Perry* and *Brackenbury v. Brackenbury*, appear to repudiate this distinction. In *Curtis v. Perry* the question was, whether a member of a mercantile firm, who was also a member of parliament, could be admitted to claim in equity an interest in ships allowed by him to remain registered in the name of his partner only, for the purpose of enabling such ships to be employed in government contracts, in fraud of an act of parliament called the Contractors' Bill, by which members of parliament were liable to penalties if employed in government contracts. And Lord Eldon held that he could not; "The moment," his Lordship said, "*the purpose* to defeat the policy of the law by fraudulently concealing that this was his property is admitted, it is very clear he ought not to be heard in

(p) 6 Ves. 747; see also 1 Mal. Ch. Pract. 403, n. (r).

(q) See also *Birch v. Blagrove*, Amb. 265.

this Court to say that it is his property (r).” In *Brackenbury v. Brackenbury* the case was this: A., the eldest son, claimed a life interest by devise from his father, and B., the second son, claimed the fee under a conveyance executed subsequently to the date of the devise. The conveyance was stated to have been made for the purpose of giving to B. a qualification to kill game, but it was never out of the possession of the father, who remained in possession of the estate, and received the rents. After the death of the father, the devisee entered into possession of the estate, and with it of the deed of conveyance. Some time after, B., the younger son, obtained possession of the deed from his elder brother, by representing that he had made a bet that he was qualified to kill game, and that if he had not the writing to show, he should lose his bet. He then refused to return the deeds, and brought an ejectment to recover the estate, on which A., the devisee, filed his bill, and moved for an injunction to restrain the action. On the matter coming before Lord Eldon, on an application in which it was not necessary to determine the principal point, his Lordship said, that both the father in conveying to the younger son for the purposes stated, and the elder brother in giving up the deeds for the purposes of the bet, were lending themselves to a fraud; and intimated an opinion, that it was a case in which a court of equity ought not to have interfered, but should have left the parties to make what they could at law. And in another part of his observations his Lordship said, “if the father executed these deeds for the purpose which the plaintiff alleges, viz. to make a fraudulent exhibition of them (as proving the qualification of his son) to defeat any prosecution that might have taken place against him by the law of the land, if he lent himself to a purpose which was contrary to the policy of that law, it might have be-

(r) 6 Ves. 747.

come a considerable question if the younger son had got possession of these deeds, whether a court of equity would have done any thing to relieve the father."

Now as in *Brackenbury v. Brackenbury* the deeds were never out of the possession of the father during his life time, it is submitted to the learned reader that we ought to take Lord Eldon's observation last quoted with reference to that fact. Therefore, so far as the fraud on the policy of the Game Laws, the case would seem to fall within the principle of *Platamone v. Staple*. Further, it does not appear by the report, whether the deeds were in fact produced by the younger son to the party with whom he alleged a bet, nor did any thing turn upon whether such was the fact or not. The opinion of Lord Eldon was given entirely as to the first point, upon the supposed fact of the father executing the grant for the purpose of a fraud on the law; and on the second point, on the fact of the elder son delivering the deeds to the younger, for the purpose of enabling him to commit a fraud; and his Lordship appears on neither point to have considered it material to inquire, whether the purpose had actually been effected or not. It is submitted, therefore, that from the *dicta* of Lord Eldon in the two cases referred to, it is to be collected, that the principle on which equity refuses its assistance in this class of cases, is the doing, with the intention of fraud, something which enables another to commit the fraud; and if that be the principle, how can its application be affected by the circumstance that the grantee does not use the power given to him of committing the fraud? If the original vice of the transaction be the *intent to enable* the grantee to commit a fraud, and *doing an act* by which he is in fact enabled to commit such fraud, why should the grantor be remitted from the consequences which would otherwise attach to his fraudulent intention and act, because the grantee for some reason, possibly an honest one, does not carry the fraud into effect? A case

however was decided before Lord Hardwicke(s), which was not cited in *Brackenbury v. Brackenbury*, and in which the very state of circumstances existed which is alluded to in the passage of Lord Eldon's judgment, before referred to(t). In that case George Green, who was a servant of the plaintiff, prevailed on his master, over whom he had got great influence, to convey an estate to him on pretence of qualifying him to kill game. Though there was a formal livery of seisin, he never was in possession, and the rent was still paid to the plaintiff, who afterwards sold that estate, and conveyed another to George Green in consideration of his delivering up that, and upon the same pretence as before, but the rent still continued to be paid to plaintiff. These conveyances were executed at such time as G. Green had got the plaintiff to live separate from his wife, and imported on the face of them to be in consideration of 3500*l.*, but no money was ever paid or intended to be paid. The plaintiff afterwards made a mortgage of his whole estate, in which G. Green was not considered as owner, and the pretence of mortgaging was to enable the plaintiff and G. Green to travel. The money raised by the mortgage was 5000*l.*, of which 3000*l.* was paid to G. Green and his wife; 1000*l.* to Thomas, the brother of G. Green, and 1000*l.* to William Lock, the attorney employed in the mortgage, but in trust for the son of said William, who also got from plaintiff two promissory notes for 105*l.* and 123*l.*, the one for procuring the money, the other for his bill of costs. Lord Hardwicke treated the transaction as a gross fraud, and set it aside; no notice being taken either at the bar or by the Court of the point whether the plaintiff's having conveyed the estate for the purpose of giving a colourable qualification to kill game, would have any effect on his right to relief in equity.

There are other cases also in which equity has refused to interfere between parties to a contract of doubtful or of

(s) *Bridgman v. Green*, 2 Ves. sen. 627.

(t) *Ante*, p. 27.

admitted illegality, on the ground of public policy. Thus in the *Earl of Westmorland v. Countess of Westmorland* (u), an injunction was asked by Lord Westmorland to restrain his wife from proceeding at law on a deed of separation, not containing an indemnity by the trustees to the husband against the wife's debts; and Lord Eldon refused to interfere, leaving the parties to try the legal validity of the deed (x).

And in an earlier case, where an agreement had been entered into between a British subject and a foreigner, for trading to the foreign country during a time of war, *provided peace should not be likely to take place between the two countries at the time for shipping the goods*, this was held a contract to defeat the laws of the country; and although at the time the trading actually commenced, peace had been established, yet as no new contract had been entered into, the Court would not interfere by injunction to stay proceedings at law founded upon the old contract. And it is to be observed, that it is not necessary that the defendant should take an objection of this nature; as it is an objection which is not confined to the parties, but exists as between both parties and the public, the Court will itself take it (y).

11. It is not easy to extract from the cases above cited any general principle governing the disposition of the Court to distinguish between those cases in which it will interfere, and those in which it will leave the parties to law.

In some of the cases it will have been perceived that the

(u) Jac. 126.

(x) Since then, the general question of the validity of separation deeds has been discussed, and their validity established by the Court of King's Bench: *Jess v. Threlkes*, 2 Bar. & Cres. 547, 4 Dowl. & Ry. 11. And in a late case in Chancery it was held

that where there is an agreement by the trustees to indemnify the husband against the wife's debts, equity will enforce specific performance of such an agreement: *Lynch v. Bird*, 2 Sim. & Sta. 372.

(y) *James v. Richardson*, 3 Mer. 469.

Court, treating the contract as clearly against public policy, has acted positively against it (*a*). In another, the Court thinking the validity of the deed doubtful at law on grounds of public policy, refused to restrain the party claiming under it (*b*); while in others again, the Court holding the agreement clearly against public policy, has also refused to act positively against its being enforced at law (*c*).

The authorities seem however to justify the following as general propositions. 1stly, That the Court will in no case give any active support to instruments founded on fraud, or on considerations against public policy; 2dly, That in selecting between positive interference, and leaving the parties to law, it will take that course which will be most likely to defeat, not the effect of the instrument, but the success of the fraud originally intended by it.

15. On the same principle as that which is applicable to the cases we have been discussing, equity will interfere where parties set up a contract apparently fair, but in fact entered into fraudulently, merely for the purpose of covering an usurious transaction.

Where a partnership transaction is merely colourable for the purpose of obtaining under the name of a partnership, usurious interest for a loan, equity will treat it as a fraudulent contract and relieve against it. But the Court will not relieve against a transaction as in fraud of the usury laws, merely on the ground that the lender, either by the very nature of the contract itself, or by some of its possible consequences, may in fact, as between him and the borrower, secure a rate of interest, which, taken simply as such, would be usurious. Thus, where a party brought a sum of money into a partnership under a deed of partnership, by which it was expressly stipulated that as between himself and his partners he was to have no concern in the business or lia-

(*a*) *Law v. Law*, 3 P. Wms. 390.

(*c*) *Evans v. Richardson*, 3 Mer.

(*b*) *Earl of Westmeath v. Countess of Westmeath*, Jac. 126. 469.

bility, and was to receive a yearly sum, which was equivalent to more than legal interest on his money; and was to be repaid at the end of the term the whole sum, and it was charged on the partnership property; yet, as he was liable as to all the rest of the world, for the debts of the partnership, the Court held that the contract was not usurious; and as the answer denied that it was merely a colourable partnership, and averred that it was *bona fide* intended as a partnership, and not as a security for a loan, the Court dissolved an injunction against the defendants proceeding at law upon a bond entered into for securing the performance of the agreement (*d*).

Again: where A. owed money to B., and B. in lieu of immediate payment agreed to take so much long annuities at a future time, at the then price thereof, and in the mean time the dividends; the debt to constitute part of the purchase-money; and as to the stock, the then price thereof to be ascertained by reference to a mutual friend;—and the construction put by the referee had this effect, that the stock having risen in price between the date of the agreement and the completion of the business, the creditor had the benefit of such rise. Usury was denied by the answer, and there did not appear to have been any thing like usury in the determination of the referee. Under these circumstances the transaction was held neither usurious, nor within the Stock-Jobbing Act (*e*); and the plaintiff having got the discovery, the Court thought he had all he could ask, and had no equity for an injunction (*f*).

On this subject we must notice a case before Lord Hardwicke, in which a tenant for life in consideration of 900*l.* demised to A. for 99 years, if he should so long live, and A. redeemed for 98½ years at 120*l.* a year, redeemable at the end of one year.

The tenant for life, afterwards, in consideration of 800*l.*, demised his estate to B. for 99 years, if he should so long

(*d*) *Fereday v. Hordern*, Jac. 144.

(*f*) *Clark v. Giraud*, 1 Mad. 511.

(*e*) 7 Geo. 2, c. 8.

live, and B. redemised for $98\frac{3}{4}$ at 100*l.* per annum, with redemption at the end of $3\frac{1}{2}$ years. A. assigns his annuity to B.; and B. dying, tenant for life confesses judgment in ejectment to B.'s executor for securing arrears. $3\frac{1}{2}$ years' arrears being due, the executor arrests the grantor. Lord Hardwicke observing that there was no suggestion of fraud or imposition, and treating as trivial the two objections to the transaction, that the time for redemption was postponed, and that the first quarterly payment was to be one month after the date of the deed, granted an injunction till the hearing, on the grantor's paying the principal and arrears into Court, and said if the grantor's life had been insured, he would have done it on his paying principal and interest (*g*). On what ground his Lordship granted the injunction is not stated, nor is it easy to see what could be the principle of the decision. That there was no usury in the transaction seems clear, and if there was no suggestion even of fraud, there seems no ground for assuming that at the hearing there could have been a decree to relieve against the annuity.

16. But if fraud in the party obtaining a legal title will prevent him from being permitted to use it, on the other hand, fraud in the party from whom the title passes, will have the effect of preventing the parties taking it from losing the benefit of it; where if there had not been such fraud, they might not have been permitted to use it. Thus, in a case where the defendants had dealt with A. as owner of a business, and he became bankrupt, and they then found that he was in fact only the agent of other parties to whom the business belonged, and against whom they recovered judgment at law, the Court refused to restrain them from pursuing the proceedings at law; although after having obtained knowledge of the fact

(*g*) *Searle v. Lord Carpenter*, Amb. 242.

of A. being only an agent, they had signed his certificate (*h*).

17. In Mr. Wooddean's Lectures (*i*), it is stated that a party sued on a policy of insurance on a life, may file a bill against the plaintiff at law, calling upon him to set forth whether his agent or broker did not represent the person whose life was insured in a state of health different from the truth, which fraud *may be a ground for an injunction to stay the action*. The learned author cites no authority for the latter position, and although no doubt a bill of discovery may be maintained, it seems very doubtful whether a bill for an injunction can; because at law the contract between the insurer and insured is vacated by fraud, and Courts of equity do not assume in general any jurisdiction in questions of insurance, except for the purpose of facilitating the trial of the validity of the policy. Thus where the facts on which the liability turns have taken place abroad, equity will grant a commission to examine witnesses, and will restrain proceedings at law until the return of the commissioners (*k*); or on suspicion of fraud will compel the plaintiff at law to make discovery of the circumstances within his knowledge (*l*). But except in these cases all issues upon policies of insurance must be tried at common law (*m*). However, in a case in *P. Williams* (*n*), where a merchant, who having information of his ship being in danger, such as to induce him to believe that probably she was lost, insured without informing the insurers of those circumstances, on a bill for an injunction, and to have the policy delivered up, it was decreed that the premiums being returned, the policy should be delivered up.

(*h*) *Taylor v. Sheppard*, 1 You. & Coll. 271.

(*i*) Vol. 3, p. 400.

(*k*) *Cleary v. Salom*, 2 Atk. 359.

(*l*) See Parke on Ins. c. 20.

(*m*) Parke, *supra*; and 4 Br. P.

C. 436; *De Ghauff v. Coxe and Comp. of London Assurance*, where a decree for a bill for payment of the sum insured by a policy was allowed.

(*n*) *De Costa v. Scandee*, 2 P. Will. 170.

18. Under the second division of this section fall the cases in which parties having legal rights, originally fair, are guilty of either positive acts or of acquiescence, actually or constructively fraudulent, whereby they vary, or permit to be varied, the rights and liabilities of other parties, to their own advantage and to the detriment of such other parties.

In *Aston v. Aston (o)*, Lady Aston was jointress without impeachment of waste, except in pulling down houses, and felling timber; remainder for life to her son, without impeachment of waste generally; remainder to trustees to preserve; remainder in tail to the issue of the son; remainder to his eldest and other sisters successively in tail. The son was permitted by the jointress to cut timber to raise a sum of money for him; and, afterwards dying without issue, the sister becoming tenant in tail, brought her action against Lady Aston, the jointress, to recover treble damages and the place wasted, and had a verdict. There was evidence that the plaintiff at law had stood by, and acquiesced in the waste during the life of the son; and the Court said there ought to be relief. There was evidence of an express consent by the defendant to her brother's cutting down the timber, or a general tacit consent or encouragement on her part to do it; and if that was given during the life of her brother, as circumstances then stood, it would be very unreasonable to suffer her or her husband, after the brother's death, and upon a change of circumstances by the value of the timber becoming greater, to take advantage of it; and the plaintiff was restrained by perpetual injunction from proceeding on the verdict. *Cawdor v. Lewis (p)* was a case of the same character. There it appeared that the ancestor of the plaintiff at law, being the agent and solicitor and confidential adviser of the ancestor of the defendant, had suffered him to erect buildings on the land in question, and to believe it and treat it as his own; and the Court, under these circumstances, restrained the defendant Lewis from proceeding in an action for mesne profits, although he had

(o) 1 Ves. sen. 396.

(p) 1 You. & Coll. 427.

established for title at law by an ejectment. The Court said, "It is admitted to be a proper subject for equitable interference, where one party stands by and allows another to spend money on his lands, without giving him notice of his title. *I fear*, a Court of equity relieves against an agent who expends the principal's money upon his own land. Whether the relief be a perpetual injunction, or an allowance by way of compensation, or a lease, must be determined by the result of the hearing. Under those circumstances, it would be perfectly idle to allow this action to be tried. In any case, whatever might be the mode of compensation here, a trial for mere profits would be utterly useless; and if relief can only be given to Lord Cawdor's claim in a Court of equity, why should I allow the other party to go to law and put the money in his pocket?"

So where a party having title has suffered another in possession with an apparent title to grant fair leases, and has stood by and allowed the tenants to expend their money in improvements, he will not be suffered afterwards, under a decree in a cause in which the tenants were not parties, restoring the possession to him, to evict such tenants, and will be restrained from bringing ejectment by perpetual injunction (i). But, if in such cases as *Aston v. Aston*, the waste had been permitted by express agreement, it seems doubtful whether equity would interfere, because that may be pleaded at law (j). On the same principle, where the creditor of a testator stood by for between six and seven years without putting in any claim, allowing all the debts to be paid except his own, and allowing the executor to take a renewal of a lease of the testator's in his own name, and to deal with it as his own, he was not permitted to restrain the creditor of the executor from seizing such leasehold in execution: the creditor of the executor swearing that the lease had been always treated by the executor as his own property, and that on the faith of its being such he, the defendant, had advanced

(i) *Steele v. Gough*, 1 Pall & B. 1 And. 104.

(j) See also *Hobbs v. Shafto*. (x) 10 L. C. 1 Vol. vii. p. 309.

his money (*s*). And in a very recent case, the plaintiff, a tea-dealer, employed the defendant, a broker, to purchase on his account tea from the East India Company, with the broker's money, and left the tea warrants in his hands as a security, and knowingly allowed him to pledge them with another person for money to pay the brokerage due for the tea; and permitted the broker, from time to time, to promise, on the part of himself and the plaintiff, payment to the pawnees, in order to stave off threats made by them of selling the tea warrants. On this state of things, Lord Cottenham, C. without giving any opinion on the legal title, or on the point whether if the pawnees had come for assistance to enforce their title, the Court would have assisted them, held, that the plaintiff had, by his own conduct, precluded himself from asking the interference of the Court in his favor, and accordingly refused to restrain the defendants, the pawnees, from proceeding to sell the warrants (*t*).

In this class of cases may also, perhaps, be mentioned the late case of *Edgecumbe v. Carpenter* (*u*). In that case, the testator had, by his will, assumed to devise real estate upon trust, with life interests to his son (who was also his heir-at-law) and to other parties, with remainders over. The son acquiesced in the will for thirteen years, and concurred with the trustee, Carpenter, in granting leases and other acts. A bill was then filed, with the concurrence and at the instigation of the heir-at-law, by certain of the *cestuis que trust*, among other things to establish the will, and to remove the trustee, Carpenter, the heir-at-law being made a defendant; and pending this suit, the heir-at-law, being advised that the will was invalid as to real estate, brought an action of ejectment against a tenant, and obtained a verdict. He then proceeded to bring other ejectments, employing in these actions, the object of which was to defeat the will, the same attorney, who was solicitor for

(*s*) *Ray v. Ray*, Coop. 264.

(*t*) *Nicholson v. Hooper*, 4 My. & Cr. 179. In strictness, perhaps, this case should have been mentioned under

a different head; but in substance it illustrates the proposition discussed in this section.

(*u*) 1 Beavan, 171.

the plaintiff in the suit instituted in equity to establish the will. Under these circumstances, Lord Langdale, M. R. held that the action of ejectment might be stayed till further order, and referred it to the Master, to inquire whether the trustee, Carpenter, should resort to the action of ejectment, or take any proceedings for the purpose of establishing the will.

19. It must not be overlooked that the general principle of these cases is not mere laches, but fraudulent dealing or acquiescence. And therefore in such cases it is put upon the plaintiff to prove, not merely to raise a probable conjecture, but to show upon highly probable grounds a case of bad faith and bad conscience against the defendant (c). In the case referred to, the assignee of an agreement for a lease claimed a longer term, on the ground of having given notice of the assignment to the landlord, and having sent him a draft lease for such extended term, and having then laid out a considerable sum in repairs, and the landlord having taken no notice of the communications of the plaintiff; but the landlord by his answer swore that he knew nothing of the repairs until they were completed; the Court held that on that point there was not enough to sustain the bill, the plaintiff having failed in proving with sufficient force that the lessor had knowingly permitted him to do those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment.

20. Another class of cases falling under this division of the subject, is that where a creditor having a title at law originally fair and equitable against a surety as well as against his principal debtor, by some transaction with the principal debtor, varies the position of the surety, and thereby taints his legal title with constructive fraud as against the surety. Thus it is firmly settled in equity, that

(c) *Per Lord Eldon in Davy v. Spence*. See 7 Ves. 252.

where a creditor gives time to his principal debtor without the consent of the surety, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal (*y*).

This appears by many cases. In *Nisbet v. Smith* (*z*), Nisbet was surety in a bond to Smith, who, not being paid at the stipulated time by his principal debtor, was required by Nisbet to bring his action against such debtor. Smith accordingly brought his action, but compromised it, agreeing that no execution should issue on the judgment for three years beyond the time originally stipulated for, if the interest should be regularly paid. The plaintiff Nisbet filed his bill to have a declaration that the bond was satisfied as against him, and to have it delivered up. Lord Hardwicke decreed a perpetual injunction on the ground that the creditor could not, by any private arrangement with his debtor, oblige the surety to remain liable for longer than he bargained for, contrary to his express covenant (*a*).

Again, in a more modern case (*b*), the defendant White was the executrix of the obligee of a bond given by Sir F. Blake, who was the younger son of Sir F. Blake, and one of the sureties in the bond; and she had brought her action against the plaintiff on the bond. It was alleged by the bill, that a parol agreement for time to pay the bond had been entered into between White the obligee, and the agent of the devisee and executor of the obligor, who was also his heir, in consideration of payment of all the arrears of interest, and the future payment of the interest from time to time six months in advance. The Court thought the transaction afforded so much doubt whether the plaintiff at law could sue on the bond after her testator had accepted interest by anticipation, that the action must be restrained by injunction until the hearing (*c*). The same point came before the House of Lords in a case from Ireland,

(*y*) *Samuel v. Howarth*, 3 Mer. 20.
272.

(*z*) 2 Br. C. C. 579.

(*a*) See also *Rees v. Berrington*, 2 Ves. 540; *Boulton v. Stubbs*, 18 Ves.

(*b*) *Blake v. White*, 1 You. & Col. 420.

(*c*) See also *Eyre v. Bartrop*, 3 Mad. 221.

and was decided in conformity with the doctrine of the cases already cited (i).

And in *Solly v. Moore* (2), a person, acting as the agent of another, accepted under protest for the account of A. bills drawn upon him by his principal, and endorsed by A.; and having property in his hands over which the principal was entitled to a lien, was directed by such principal to obtain for him, and might, by taking proper steps, have obtained the benefit of such bills; but, instead, he colluded with the parties claiming subject to the lien to sell the property, and afterwards brought his action for the amount of the bills against A. the endorser, whereby the principal would have been liable over to A.; the Court of Exchequer restrained him from proceeding, ordering however the plaintiff in equity to pay the money into Court. And here may be noticed also a case, where parties having assented to an agreement between their debtor and other persons, whereby his liability was transferred to them, were not permitted afterwards to use their debt for the purpose of putting the debtor in a position to be deemed under the Act of 1 & 2 Vict. c. 110, and 2, to have committed an act of bankruptcy (3). In the case referred to, an objection was taken to the jurisdiction of the Court, on the ground that the Bankruptcy Court had jurisdiction as a Court of equity as well as law, and that an injunction could not be granted to prevent a party suing out a fiat in bankruptcy. But the Court said that the Bankruptcy Court should not interfere in that stage of the proceedings, but must let the affair go on to the end before it could do justice, and there was no reason why the parties should be allowed to proceed on the debt so far as the fiat; and that this was not an injunction to restrain a party from suing out a fiat, but to prevent the defendants, in fraud of the agreement which they had themselves sanctioned, from using the debt of the plaintiff for the purpose of proceeding to take out a fiat against him. So if a tenant having

(1) *See* *1 Eccard v. Broughton*,
[*Moore*, 25.]

(2) *Solly v. Moore*, 8 Trer., 671.
[*Chittenden v. Bann*, 9 Trer., 192.]

disputes with his landlord, touching the terms of the holding, has given a replevin bond on a distress for a year's rent, and then enters into an agreement with him to refer their disputes to arbitration, the surety in the bond is discharged ; for by the agreement the landlord prevents the tenant from doing that which the surety had bound himself that he should do (*g*).

The rule as between creditor and surety applies equally, though the surety should know the fact of time being given to the principal debtor ; to take the case out of it, the surety must expressly consent. But if the time given is not by positive contract, but the case is only that the creditor is inactive, the surety will not be relieved in equity (*h*).

But although the creditor may, if he chuses, remain entirely passive, he cannot act and then withdraw his act without the consent of the surety (*i*). Thus if he takes the goods of his debtor in execution, and afterwards withdraws the execution, he discharges the surety both at law and in equity (*k*) ; but if after such withdrawal the surety makes a fresh promise to pay, he renders himself liable, not as contracting a new, but as reviving the old debt (*l*). And on these grounds, in a case where there being two sureties, the creditor took the goods of the debtor, and then withdrew the execution ; and then one of the sureties, with notice of the withdrawal of the execution, gave a fresh promise to pay ; an injunction was sustained against proceedings at law by the creditor, on the terms, however, of the surety paying the money into Court for which he was surety (*m*).

But if a creditor cannot by his own act vary the extent of the liability of the surety, on the other hand a surety in a bond cannot in general, by his mere intimation that he will no longer hold himself liable, discharge himself from his liability, without the acquiescence of the creditor.

(*g*) *Bowmaker v. Moore*, 3 Price, 214.

(*h*) *Samuel v. Howarth*, 3 Mer. 272 ; see also 6 Ves. 734 ; *Eyre v. Everett*, 2 Russ. 381.

(*i*) 6 Ves. 734 ; 2 Swanst. 191.

(*k*) *Mayhew v. Crickett*, 2 Swanst. 185 ; see *ibid.* p. 191.

(*l*) *Ibid.*

(*m*) *Mayhew v. Crickett*, 2 Swanst. 185.

Thus in a case where A became guarantor for B., who not paying his acceptances, the creditors brought an action against A., who defended it, alleging that by their conduct they had deprived themselves of all claims against him; pending the action B. became bankrupt; the creditors proved under the commission, and signed the bankrupt's certificate, notwithstanding a notice from A., that although he did not admit his liability, he would bind himself, if they signed the certificate, altogether discharged. The certificate would not have been obtained had they not signed it. The action then proceeded, and the creditors having obtained a verdict, A. filed his bill for an injunction to stay execution. The Lord Chancellor held that no equity arose in favour of the plaintiff out of the conduct of the defendants, in enabling the bankrupt to obtain his certificate. As the law then stood, his Lordship said, "the surety might go in under the commission and prove: he had distinct and independent rights of his own; and if he did not choose to take the course which would enable him to assert those rights, he could not expect aid from a Court of equity (*n*)."¹ Nor will the case be altered by the terms of the bond being indefinite as to duration. Thus where A. was surety in a bond, to secure the due accounting of B. during his continuing in the service of C., and no time was prescribed as to the duration of such service on either side, and A. died, and his executrix gave notice that she would no longer be liable; C. did not answer the notice, but took security from other sureties; B. died, leaving deficiencies, and C. brought an action against the executrix of A., who obtained the common injunction to stay the proceedings. On a motion to dissolve the injunction, the Court said "that C. never gave any intimation that he did not consider the executrix as continuing liable under A.'s bond; that C.'s conduct did not operate in any manner upon her;" and dissolved the injunction (*o*).² A motion was afterwards made before the Lord Chancellor to discharge this order, and

(*n*) *Brown v. Carr*, 2 Russ. 602. (*o*) *Gordon v. Collett*, 2 Sim. 254.

for an injunction : it was refused with costs, and principally on the same grounds (*p*).

It must be observed also, that an injunction will not be maintained to restrain the obligees of a bond from suing the surety, because the obligees have lent a further sum to the principal obligor, and taken his separate bond for it, nor because they have simply abstained from suing him, not expressly giving him time ; for, as already noticed, the surety is not discharged by the mere passive conduct of the creditor in not suing, but he must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing (*q*).

21. There is a class of cases in which the doctrine of relief against fraud has been carried to an extent which seems almost to defeat the very object of that doctrine, and to repress fraud in one party by supporting it in another. I allude to the cases in which persons having concealed the truth, or made false representations respecting their legal and fair claims, for the purpose of enabling fraud to be committed upon others, or upon the policy of the law, have been restrained by equity from afterwards enforcing their claims, even as between themselves and the parties to the fraud. As for instance, in an early case (*r*), a woman, upon a treaty of marriage, not having as great a portion as the intended husband insisted on, induced her brother to let her have 160*L.*, and gave him a bond for repayment of it : the husband knew nothing of the transaction. The husband then died ; then the wife died, and made the plaintiff her executor. Then the brother, the creditor, died, and his executor put the bond in suit against the plaintiff. The Court restrained him by perpetual injunction from proceeding to recover upon the bond. It was insisted that the bond was good against the woman, she

(*p*) 4 Russ. 581.

(*r*) *Gale v. Lindo*, 1 Vern. 475.

(*q*) *Fyre v. Everett*, 2 Russ. 381.

having survived her husband, but the Court said that would make no difference; what was once a fraud would always be so.

So in *Hedman v. Hedman*(*c*), on the treaty for the marriage of the plaintiff, her intended husband being indebted by bond in 200*l.*, the plaintiff's father was induced to consent to the marriage, by the obligee delivering up the bond, the brother of the husband giving a new bond; but the husband gave a counter bond to his brother to indemnify him. The Court held this a fraud, and decreed the brother to deliver up the counter bond. And in a case even at law (*d*), where a note was given by A. to his brother B. fraudulently to forward the marriage of B., by representing him to be a man of fortune. A. afterwards recalled the note, and on a motion to set aside an award made by arbitrators, Lord Mansfield, C. J., thus stated the law: "where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it; it shall be as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c. so misrepresented, has been specifically settled on the wife; for no man shall set up his own iniquity as a defence, any more than as a cause of action(*e*)."

In *Turton v. Benson*(*f*), the case was, A., on his marriage with B.'s daughter, was to have a portion of 1000*l.*, in consideration of which A.'s mother enabled him to make a settlement; but A. secretly agreed with B. to pay back 1000*l.* at the end of seven years. B. died, and A. then sought to be relieved on his bond. It was held by the Master of the Rolls, and on appeal by Lord Chancellor Parker, that he was so entitled, both against the executors and the creditors of B.: and Lord Chancellor Parker, on

(c) 1 Vern. 340.

Vern. 365; *Turton v. Benson*, 2 Vern.

(d) *Mortimer v. Mortimer*, 1 W. Black. 363.

791; and 11th Wm. 326.

(e) 2 Vern. 764.

(f) See also *Lambert v. Humeau*, 2

the appeal, stated, that the parties themselves to such an agreement were entitled to relief, "for so," said his Lordship, "were all the precedents."

But in cases of this kind, where equities are equal, the rule *qui prior est in tempore potior est in jure* applies, and therefore in a case where, on the treaty for the marriage of B., A. his father made a settlement for the benefit of his son and the wife, reserving to himself power to settle (out of the settled premises) 100*l.* a-year on any after-taken wife of the father, on payment of 1000*l.* to the son. On the treaty for the father's second marriage, the son released (without the privity of his wife) the 1000*l.*, but took a bond from his father for the payment thereof, which bond was so given without the privity of the intended second wife of the father or her relations. The son after the marriage sued on the bond, and the father brought his bill in equity to be relieved. The Master of the Rolls held that the father should not be relieved; for that whatever arguments could be made use of in favour of the wife of the plaintiff, to prove that he ought to be discharged of the bond, were good on behalf of the son and his wife to prove it ought to be paid: that the release was as much a fraud on the son's marriage, as the bond was on the father's; and that as the agreement on the son's marriage was the first, it ought to have the preference; and the only relief that could be afforded to the father was a perpetual injunction, on payment of principal, interest, and costs (*x*).

In some of the cases above-mentioned, it is to be observed that the instruments given were originally without valuable consideration, and the transaction altogether based on a fraudulent purpose; but the leading case on this subject is *Neville v. Wilkinson* (*y*), in which the legal title was originally fair, and based on a valuable consideration, and yet the plaintiff at law was deprived in equity of the benefit of such his legal title, because he had so dealt with it as to

(*x*) *Roberts v. Roberts*, 3 P. Wms. 66. (*y*) 1 Brown C. C. App. 543.

make it an instrument of fraud on a third party. In that case the defendant was the plaintiff's collector, and having had various pecuniary transactions with him, had claims against him for a valuable consideration to a considerable amount. On the occasion of the plaintiff's negotiations for a marriage with the daughter of Robinson, the defendant was induced by the persuasions of the plaintiff to make to Robinson a false representation of the plaintiff's debts, and in particular to conceal the debt to himself. It did not appear that the extent of the plaintiff's debts was a condition of the father's consent. The Lord Chancery said, the defendant confessed a conspiracy to cheat Robinson, and he would not lay it down as a rule, that fraud in cases of that nature must be upon an article expressly contracted for; and granted an injunction to restrain the defendant from proceeding to recover any debt due before the marriage of Neville, except certain claims agreed upon between the parties; and he delivered his opinion that the defendant could not ever recover that debt against the plaintiff (2).

A case is referred to by Mr. Belt, in his note to *Neville v. Wilkinson* (a), as being decided in the House of Lords, where, in a treaty for the marriage of a minor, the father of the lady, who, by the marriage articles contracted, in consideration of a settlement to be made by the husband, to give his daughter 50,000 marks, prevailed on the husband the night before the execution of the marriage articles, to sign secretly a deed, by which he bound himself to discharge the father from the payment of 10,000 marks. After the husband came of age, he brought his action according to the laws of Scotland, to have this secret obligation annulled; and the Lords of Session annulled it. By Mr. Brown's report of the case in the House of Lords (b),

(2) See also as to the effect of a private agreement in fraud of a marriage contract, *Palmer v. Nourse*, 11 Ves. 165.

(a) *Morris v. Arbutnot*, 1 Br. C. C. App. p. 547.

(b) 6 Bl. P. C. 247.

it appears that the defendant in the Court below did not present his petition of appeal till eleven years after he had acquiesced in the decision of the Lords of Session, and after repeatedly promising payment, and further that no counsel appeared for the appellant. The case can hardly, therefore, be considered as decided by the House of Lords. The doctrine is, however, perfectly consistent with the other authorities.

CHAPTER II.

Of Injunctions to stay Proceedings at Law where the Plaintiff in Equity has some equitable Right to set up against the Plaintiff at Law, of which the Court of Law cannot, either by reason of Want of Jurisdiction, or by reason of its Form of Proceeding take Cognizance; or where the Legal Right of the Plaintiff at Law is coupled with, and obviated by, some Equitable Liability.

1. Injunction to stay Proceedings at Law in all all kinds of Personal Actions.
2. What necessary to obtain an Injunction, in all all kinds of Personal Actions.
3. General Proceedings in the Court of the King.
4. Effect of Repetition from the Time limited for the Performance of a Contract.
5. Injunctions in Cases of specific Performance, where the Meaning and Effect of Agreements, or the Powers of the Parties issuing them to bind their Signatures, are in Dispute.
6. Injunctions against a Creditor retaining in his Personal Property, when a Public Fund is provided out of the Debtor's Estate for the Payment of his Debt.
7. Objections in *Peacock v. Sturt*, and *Wright v. Simpson*.
8. Injunctions in Cases of Mistake.
9. Injunctions where the Defendant is not his good Matter of Defence, but must set up (1) Claims of the Form of Proceeding.
10. Injunction where the Liability proceeds from the same cause, and where from the Nature of the Contract or Case is contrary with the proper Form.
11. Where there is a Legal Right coupled with an Equitable Liability.
 1. Demotion of the Effect of a Mortgage's Proceeding for the Debt or Contract after Foreclosure.
 2. Proceeding in Repossession a Distress from being in the Acknowledgment of the Debt after Judgment.
12. Injunctions where equitable Advantages would result from exercising Powers under an Act of Parliament.
13. The Court does not interfere in Cases of this Court merely on the ground of Unconscionable.
14. Where the Real Cause of the Parties can only be ascertained by a committed Account.

UNDER this division are to be considered cases upon agreements for the purchase of interests in land and tenements,

and other agreements, leaving the legal title to the thing agreed for in one of the contracting parties, while an equitable right passes to the other. Generally, in such cases, equity will restrain the party having the legal title from proceeding upon it at law, to disturb the other party in his enjoyment of the thing agreed for, unless by some circumstance the party who has the equitable right has deprived himself of the benefit of his equity. Thus it is a common head of equity, that a person holding under an agreement for a lease may obtain an injunction in aid of a bill for specific performance, to restrain the landlord from proceeding in an action of ejectment (*a*). But if the circumstances of the case appear to the Court to make it doubtful whether it will not refuse specific performance, it will either refuse to restrain the landlord from pursuing his legal right, or if it restrains him, will put the tenant on terms. Thus, in *Buckland v. Hall* (*b*), the tenant, under an agreement for a lease, being bound by his agreement to do certain repairs, became insolvent before those repairs were completed, and of the repairs commenced, some were not in accordance with the agreement; Lord Eldon, pointing out the importance of the question of insolvency in a lessee, who is to be liable during the whole term, refused to restrain the landlord from bringing an ejectment (*c*).

In an earlier case before the same learned judge, in which an injunction had been obtained, there was considerable doubt as to the terms actually agreed upon by the parties; but the tenant had been let into possession. On the other hand, the answer of the defendant stated the insolvency of the tenant, and various breaches of the agreement during five years' possession, tending to the ruin of the land. The Court, under these circumstances, thought it not a case for dissolving the injunction *simpliciter*, but would only uphold it on terms, which would secure to the defendant, if it should turn out at the hearing that the

(*a*) Vide Edén on Injunctions, 27.

(*c*) *Ibid.*

(*b*) 8 Ves. 92.

tenant was not entitled to specific performance, the whole benefit he could have if the injunction were not sustained (*d*). But where one has contracted for a lease, and assigned his interest, the insolvency of the assignor is no ground for the landlord to refuse specific performance, provided the contract does not appear to have been made by the lessee, specially and personally, with the assignor, and provided the assignor be solvent and able to enter into the covenants, and an injunction will be sustained in such cases, to restrain the landlord from bringing ejectment (*e*).

In *Attwood v. Barton* (*f*), the question was, whether what had passed between the plaintiff and defendant amounted to an agreement by the defendant to grant to the plaintiff a sub-lease of certain lands of which the defendant was lessor, and an injunction was sustained against an ejectment on the following state of circumstances. The plaintiff alleged, that on the faith of there being such an agreement, he had entered into possession, and had expended money upon the premises with the knowledge of the defendant; the defendant admitted that the plaintiff had asked that he might have the refusal of the premises in question, and that he had let the plaintiff into possession. He admitted also that it was his expectation, and might probably be also that of the plaintiff, that his (the plaintiff's) holding would continue as long as the defendant held of his lessor; but he denied, to the best of his recollection, that there was any engagement entered into or asked of him by the plaintiff, and he denied the expenditure of money by the plaintiff. The Lord Chancellor said, "looking at what passed before the lease was granted, at the enjoyment which had been had, to that thing called the *understanding* of the parties, coupled with what took place before, and what had passed since the lease was granted to the defendant, I think it is a great deal too much to decide

(*e*) *Bartholme v. Moore*, 6 Ves. 431, and see *Morgan v. Rhoads*, *ibid.* 467.

(*f*) *Attwood v. Barton*, 7 My. & K. 200, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

against the plaintiff at present, and to say that the case cannot be taken out of the statute of frauds." But as there were only two years to run of the term contended for by the plaintiff, the injunction was only sustained on terms. On the other hand, the Court will assist the vendor, where there is doubt whether he will or not be able to make a title. Thus, where in a suit for specific performance, the objections taken by the purchaser were such that they could not be adjudicated on till the hearing, one question being whether time was of the essence of the contract, which depended on evidence ; and another whether a will made between the suicidal act of a testator and his death was valid ; the Court enjoined an action by the purchaser to recover his deposit, till the hearing (*g*).

2. It is not necessary, in order to sustain an injunction to stay ejectment in aid of a bill for specific performance, to show a clear right to specific performance ; it is enough to show some colour of it. And, therefore, where a lessee under a lease containing a covenant not to assign without licence, agreed to let to another with a like covenant, who assigned to parties for the benefit of creditors, and then became bankrupt, and his trustees became his assignees ; the Court sustained an injunction to stay ejectment by the lessee till the hearing, as there was a possibility of right to specific performance in the plaintiffs, since they might obtain a licence from the lessor (*h*). And when the question is whether an agreement to grant a lease under a power is within the power, and the Court cannot come to the conclusion that it is not, an injunction will be granted to restrain ejectment (*i*). When one has agreed to take a lease from another with usual clauses, and not to underlet except on terms, it is not a waiver of the agreement that the tenant has before refused to execute a lease, on the ground that the agreement is all he wants ; for that would not amount

(*g*) *Lery v. Lindo*, 3 Mer. 81.

(*i*) *Price v. Asheton*, 1 You. &

(*h*) *Powell v. Lloyd*, 1 Y. & Jer. 427. Coll. 82.

to saying that he never would execute a lease, nor in advertising that the farm will be underlet, a forfeiture. And in such a case the landlord will be restrained from proceeding at law to turn out the tenant; the latter, however, being put on terms to deliver possession when required by the Court (*h*). But if, under an agreement for a lease, the tenant has treated the farm in a grossly undilapidated-like manner, the Court will not, in a suit for specific performance, sustain an injunction to restrain the landlord from recovering possession, if it sees that the lease, when executed, must be put in and to immediately under a clause of re-entry for breach of the covenants in the lease (*i*).

In *Williams v. Cheney* (*m*), which was a suit for specific performance simply, the point was, whether a person having an agreement for a lease whenever he should request it, for the special purpose of carrying on his trade, or for the special purpose of a residence only, had put it out of his power to accept a proper lease under the agreement, by entering into an agreement with a third party to underlet to him, with a proviso, that if he should not be enabled so to underlet, then he was to return the purchase money; the Master of the Rolls said it was a mere covenant to underlet *if he could*, and that did not take away his right to a specific performance of a positive agreement. It seems hardly necessary to state, that where the Court sees clearly that the party claiming to have an agreement specifically performed, has put himself, by gross misconduct, in such a position that he cannot execute it, it will not only not decree specific performance, or restrain ejectment, but will dismiss the bill with costs (*n*).

3. The principle to be collected from the authorities seems, that an injunction in cases of specific performance is in aid of the *presumed right* of the plaintiff to have spe-

(*h*) *Gourley v. Duke of Somerset*, 1 Ves. & B. 60.

(*m*) 3 Ves. 59.

(*i*) *Ibid.* per L. C., p. 72.

(*n*) *Hillsgrove v. Joyce*, 3 Ves.

160.

cific performance, and that where the Court sees that his conduct has been such, that had the contract been sooner enforced, he would have incurred a forfeiture for breach of the covenants, it will not presume as of course that at the hearing it would decree specific performance, and therefore will not in the mean time in general interfere with the legal title; or if it does, will only do so upon such terms as will in effect secure to the landlord the full benefit of his legal title, if the Court should ultimately be of opinion that the plaintiff in equity has no equity. If on the other hand the circumstances are such, as to make the Court feel doubt whether it will not at the hearing decree specific performance, it will relieve by injunction against the legal title.

4. In transactions relating to the purchase of estates disputes frequently arise, from the conditions of sale fixing particular periods for the delivery of the abstract and the completion of the purchase, and such periods being allowed to pass without the conditions being complied with.

The point then frequently comes before the Court, whether or no the purchaser shall be restrained by injunction from bringing an action to recover the deposit, pending a suit by the vendor for specific performance of the contract. In *Pinche v. Curtis (o)*, one of the conditions of sale was, that the purchase should be completed by the 5th of April then next. The purchaser, early in the year, applied for an abstract, which was not sent to him; and then, after the time fixed for the completion of the sale, he applied for a return of his deposit, saying, that he would not proceed in the purchase. Afterwards an abstract was sent to him, and he appears so far to have re-adopted the contract as to have examined the abstract, and to have intimated again his intention of not going on, on the ground of certain doubts appearing on the abstract: the purchaser was restrained

from going on with an action to recover the deposit; but the Lord Chancellor said, if the vendor had called for the deposit at the end of the time limited for completing the purchase, and had intimated he would not go on with the purchase, the Court would not have compelled him. So in *Fordyce v. Ford* (*pi*), the defendant had purchased at an auction an estate described as freehold; (an abstract being delivered, it appeared that a small part only was freehold, and the rest leasehold). The purchaser took no objection as to that head, but objected to the shurtness of the title, both of the freehold and leasehold. Negotiations went on for a considerable time, and when at length the objections were cleared up, the purchaser refused to complete the purchase, on the ground that he wanted the estate for his summer residence for that year, and that the vendor not having made out a title within a reasonable time, he was not bound to go on: the Master of the Rolls said, if the purchaser had made the objection as to its being represented as freehold with leasehold adjoining, and turning out leasehold, he should not have thought he ought to be bound; but as to the objection on the ground of delay, his Honor thought it was a case where the plaintiff might have a right to compel specific performance, and therefore an injunction was granted on bringing the money into Court. The same principles were applied in *Lloyd v. Collet* (*q*): there the agreement for purchase was in August 1792, and by the agreement the purchase was to be completed by the 25th March, 1793. The purchaser had, shortly after the execution of the agreement, and repeatedly between that and the 25th March, called for an abstract of the title, and being unable to obtain it, he shortly after the 25th March, 1793, called for his deposit, and after repeated and fruitless applications, he brought an action to recover it in June, 1793. No abstract was delivered till September of that year, and when it was delivered, the purchaser, instead of so dealing with it as to re-adopt the contract, again

insisted upon his deposit, whereupon the plaintiff filed his bill for a specific performance, and for an injunction. The Lord Chancellor held, that the conduct of the vendor was evidence of the abandonment of his contract, and refused the injunction.

5. Injunctions have sometimes also been granted in aid of specific performance, where disputes have arisen on the meaning and effect of agreements; or the power of the parties making them to bind their successors; or the description of the thing agreed to be sold. Thus equity will in many cases decree a specific performance of an agreement for the sale of an interest, although the vendor has not the interest which he assumed to sell, if a sufficient compensation can be made (*r*). And in such cases equity will in general interpose by injunction to stay proceedings at law, until the Court has decided whether a specific performance ought to be decreed. But if the whole question turns on the legal construction of language used in the agreement, and that question can be clearly and solely raised by an action at law, the Court will not grant an injunction (*s*). There is no instance, Lord Eldon said, in the case referred to, in which the Court has enjoined, when it appears upon the face of it, that the action commenced must have the effect of obtaining the judgment of a Court of law on the whole case (*t*).

Where a person being entitled under a settlement as tenant in tail, made on his marriage a fresh settlement by deed of the entailed estate, by which he gave a life estate to his wife, with remainders in tail to his son, and in consideration of that settlement, the wife's parents, by the same deed, settled certain estates so as on the death of the husband to give an estate tail to his son; the son, on the death of his father, brought an ejectment against his mother, the tenant for life, claiming as tenant in tail paramount the settlement of

(*r*) See on this head, 1 Sug. Ven. cap. 6; see in particular, p. 238.

(*s*) *Stewart v. Alliston*, 1 Mer. 26.

(*t*) *Ibid.* 32.

the estate of his father, while at the same time he contended that he was entitled to the estate came from his mother's family, as tenant in tail under the settlement, but the Court thought that the father had become a purchaser for himself and family of the estate conveyed by his wife's family, and that the son could not be permitted to have the thing contracted for, unless he would pay the whole price which the parties mesne should be given for it; and consequently restrained the ejectment till the hearing, or further order (6).

And where a tenant for life had a power to grant leases in possession without fine, at the best rent that could be obtained, and the question arose whether the remainder-man was bound by such a *contract for a lease* by the tenant for life, as would have bound him, the tenant for life, if living, and would bind his assets to make recompense; Lord Redesdale restrained the remainder-man from bringing an ejectment till the hearing, expressing his opinion that the remainder-man was bound. It must be observed, however, that there were other circumstances constituting ground for sustaining the injunction. The remainder-man had permitted the tenant to retain possession for nine years after he attained his age, without interruption, and to expend money in improvements, and his Lordship considered it material that no idea had been given to the tenant of an intention to dispute his title, until the period had probably passed when he could obtain satisfaction out of the assets of the tenant for life (7).

Again, where a company having a specific power of bringing actions in the name of their treasurer, for disturbing them in their buildings, works, &c. but no general power to sue and be sued by their officer, purchased, with notice, land held under an agreement for a lease, a bill for specific performance against certain of the shareholders only was sustained; and though in such a case the Court could not compel

(6) *Good v. Good*, 3 Met. 66.

(7) *Shannon v. Beckett*, 1 S. & Lef. 52.

the execution of a lease, it bound the absent parties by declaring the plaintiff entitled to a lease, and restrained the treasurer from bringing an action to disturb him in the possession (*y*).

6. A question has sometimes arisen, and seems yet unsettled, whether if a creditor has a personal remedy against his debtor, and there is also a fund provided for payment of the debt out of the debtor's estate, from which the creditor might obtain payment if he made due application, he is bound to do so, and in default will be restrained from resorting to his personal remedy. This sort of point arose in several cases shortly after the declaration of independence of the United States of America, in reference to the remedies of parties having claims against persons whose property in America was by certain acts of the American legislature made a fund for payment of their debts, and subject thereto, was confiscated to the state.

The first in order is a case of *Kempe v. Antill* (*z*), in which the plaintiff was a British subject resident in America, who during the American war adhered to the British government. After the declaration of independence of the United States, his property in those states was confiscated, subject to the claims of his creditors. Previously to the breaking out of the war, he was indebted by bond to the testator of the defendant, who died before the Act of Confiscation passed, leaving the defendant his executor. The defendant, instead of resorting to the special fund set apart by the American government for the payment of his debt, came to this country, and then brought his action upon the bond, whereupon the plaintiff filed his bill for an injunction.

The Act of Confiscation did not in terms make any distinction between creditors well or ill affected to America, but it appeared by the answer, that the defendant, having taken part against the Americans, had become as obnoxious

(*y*) *Meux v. Maltby*, 2 Swanst. 277.

(*z*) 2 Brown C. C. 11.

as the plaintiff, and was obliged to quit that country, where he believed that his estates had been sure confiscated, and himself declared guilty of high treason. Although therefore there appeared no strictly *legal* objection to his resorting to the fund specially made liable by the American government, it seems clear that the same events which made the plaintiff's property liable, made it practically impossible for the defendant to resort to it as a fund for payment, and it is difficult to see upon what principle any argument could be supported for depriving him of the personal remedy for which he had contracted, and which the law gave him against his debtor, because he had not resorted to a security which he had never contracted for or accepted, and to which, by the acts of a foreign government, he was in effect restrained from resorting. The Court intimated that an injunction could not be granted. The motion stood over, and the plaintiff afterwards gave up the point, and paid the money.

In *Peters v. Erring(u)*, which came on on a motion to dissolve an injunction against the defendant's proceeding at law upon a bond, the same point arose, under circumstances however somewhat different. The plaintiff's testator had property in America, which was confiscated, subject to his debts; the defendants, who were the executors of the creditor, were resident some of them in England, and some of them in America. The defendants, resident in England, swore that they did not know that the debtor had property in America. The defendants in America admitted that warrants might have been obtained at the time of the passing of the Act of Confiscation, but said that they would not have been immediately payable, and would not produce at the time the bill was filed more than four or five shillings in the pound. The Lord Chancellor dissolved the injunction, expressly on the ground of the defendants not knowing of the debtor's property in America until the filing of the bill,

and expressing an opinion, that if the creditor could *bonâ fide* obtain anything in America, he ought to do so.

In a subsequent case (*b*), the same learned judge repeated and applied the doctrine thus pointed at. In the case referred to (*c*), it appeared that one of the defendants, who claimed under a bond creditor of the plaintiff, having applied to the commissioners appointed by the American government to determine claims upon confiscated property, such commissioners had refused to adjudicate, and had referred him to the American legislature; but he had not applied to that legislature, believing that such application would be wholly useless. The greater part of these facts appearing by the answer of one of the defendants, who was the attorney of the principal defendant, the Lord Chancellor granted an injunction (*d*), Sir L. Kenyon, M. R., who assisted him, concurring; and at the hearing of the cause, the Lord Chancellor said he was still of the same opinion as he was before, as to the equity in general; for if, his Lordship said, "a creditor here had a fund in a public treasury provided for payment of his debt, and would notwithstanding pursue the debtor personally, it would be the most unconscientious case possible." But as the defendant swore he had made every reasonable effort without effect to obtain payment from the American government, and that answer was not contradicted, the order made at the hearing of the cause was, that the money should be paid to the defendant upon his giving security to refund it, if the decree should be against him.

The principle of *Wright v. Nutt*, although supported by the authority of Lord Loughborough, in a case at law where the same sort of question arose (*e*), has been disapproved by Lord Eldon in a later case, which related to the same estate as the case of *Wright v. Nutt*, and in

(*b*) *Wright v. Nutt*, 3 Br. C. C. on an injunction, 1 H. Blacks. 137.
326. (*e*) *Folliott v. Ogden*, 1 H. Bla.

(*c*) *Ibid.* 123.

(*d*) See the case on the argument

which the circumstances were nearly the same (*f*). In that case his Lordship, referring to those authorities, said, if his decision were to depend on his acceding to them, he was not prepared to say he could agree to them. He decided the case, however, on the facts. He said, that the authorities in question all concerned, that to bar the creditor of his personal remedy, he must have the clear means, and it must be shown that he had such means of making his demand against the other fund effectually; and in the principal case his Lordship thought it was not clear that the creditor had such means, as it was not clear that he was one of the well affected to the government of America.

There is another case on this subject, of which a short statement is to be found in P. Williams (*g*). There an action was brought by a creditor against a person who had been a director of the South Sea Company, and he filed a bill for an injunction, on the ground that an act of parliament had vested all his property in the trustees of the company, and had made provision for the payment of his debts thereout; and he urged, that as the legislature had provided such funds, the creditor ought not to proceed on his personal remedy against him. But Lord Chancellor Parker refused the injunction. There is also another early case (*h*) which to some extent involves the principle under discussion, and so far as it does do so supports the decision in *Holditch v. Mist*. In the case to which I refer (*h*), a party had insured his ship in time of war, and it was taken and retaken, and condemned and sold in the Prize Courts. Whereupon, under the 13 Geo. 2, c. 4, s. 18, the party insured would have a right to receive the salvage, and if he did receive it, would only be entitled to recover the balance under his policy of insurance. But it was held, that if he offered to relinquish the salvage to the insurers he might proceed on the personal remedy for the whole,

(*f*) *Wright v. Simpson*, 6 Ves. Will. 695.

714.

(*g*) *Pringle v. Hurdley*, 3 Ark.

(*h*) *Holditch v. Mist*, 1 Peere 195.

unless indeed there had been fraud in the loss of the ship. And accordingly in this case, the defendant offering to relinquish the salvage, an injunction to restrain him from proceeding in an action for the full amount of the policy was refused.

7. The case of *Holditch v. Mist* was treated by Lord Eldon in *Wright v. Simpson* as a decision in point against the principle of *Wright v. Nutt*; and in the latter case itself, although Lord Thurlow professed not to overrule it, but rather to assume that there was more in the case than was to be found in the report, yet his Lordship appears to have considered it as a decision not reconcilable with his opinion. I would observe, however, with very great deference, that the *decision* in *Holditch v. Mist* appears principally to have turned on the point, that the act of parliament did not appear on the pleadings. And with regard to the case of *Wright v. Simpson*, it must be observed that there was a feature distinguishing it from *Wright v. Nutt*, viz. that in the former it did not appear that the creditor could have resorted to the public fund set apart for payment of the debtor's debts; whereas in *Wright v. Nutt*, the creditor was actually a member of the American Congress, and was admitted by the answers to have been friendly to that government.

On the whole, the state of the authorities and dicta under discussion does not seem such as to warrant an attempt to lay down any general rule. Perhaps it might not be improper to consider cases of this nature with some reference to those cases which involve the principle of marshalling, viz. that if a creditor has two funds, he shall be compelled to take that which, paying himself, will leave another fund for another creditor (i). For if in such cases as *Wright v. Nutt*, and the others of the same character, a creditor having a claim against the fund provided out of the debtor's estate, as well as his personal remedy, is not

(i) See *Lannoy v. Duke of Athol*, *Cooper*, 8 Ves. 382; and see 9 Ves. 2 Atk. 444; *Attorney-General v. Tyndall*, *Ambler*, 614; *Aldrich v.* 211.

bound to resort first to the public fund, he may undoubtedly prejudice other creditors who have only a personal remedy.

8. That equity relieves against mistake of fact (*k*), though in general not of law, is almost an elementary proposition, and the cases abundant in which that relief is administered in various forms (*l*). But the greater number of these are not cases of injunction, but of general relief, and therefore it does not fall within the scope of this work to notice them, further than to say that where equity would give general and permanent relief against mistake by setting aside or reforming an instrument, it would also in general, if the circumstances rendered an interlocutory interference requisite, restrain proceedings at law on such instrument in the mean time. The principle of this jurisdiction is the same in substance as that which governs the cases already discussed in this section; viz., that if a deed is framed contrary to the intention of the parties in their contract on the subject, the forms of proceeding in the Courts of common law will not admit of such investigation of the matter in those Courts as will enable them to do justice. The parties claiming under the deed have therefore an advantage in proceeding in a Court of common law, which it is against conscience that they should use, and a Court of equity will on this ground interfere to restrain proceedings at law until the matter has been properly investigated (*m*). This doctrine was applied in a late case, where an agreement had been entered into by the plaintiff, a solicitor, on behalf of his client for the payment of two sums of money of 4000*l.* each to the defendant, and it appearing afterwards that there was a further sum of 200*l.* due to the defendant, the plaintiff agreed personally to pay that sum. It was found afterwards that the covenant for payment was so framed as to make the plaintiff liable to pay one of the

(*k*) See 1 Fonb. 116, and the notes. vol. i. cap. 5.

(*l*) Rad. 17. 124, and the cases

(*m*) See the cases cited in 1 Fonb.

there cited.

117. in 117. and also Story's Eq. Jur.

sums of 4000*l.* as well as the 200*l.* The answer admitted that it was by mistake that the plaintiff was made personally liable for the 4000*l.* but stated that the agreement was drawn by the plaintiff himself, and the defendant relied on that circumstance to rebut his equity. But Sir J. Leach said, "there was no such principle in equity as that a party should not be relieved against his own mistake; for common mistake is the ordinary head of equity. And every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake." His Honor accordingly sustained the injunction which had been obtained to restrain proceedings at law upon the agreement(*n*). And where on the renewal of a lease and a deputation as keeper of a chase, the renewal of the deputation was by the mistake of both parties referred to the term in the old lease, and therefore in effect expired with the old lease, the Court decreed a new deputation to be executed, and granted a perpetual injunction to restrain the lessor from disturbing the grantee of the keepership(*o*).

Under this head too may be mentioned a case upon powers(*p*) in which it was decided firstly, that where a party comes into equity for an injunction against proceedings at law founded on the defective execution of a power, he must admit by his bill that the power is badly executed *at law*; and secondly, that such an injunction will not be granted where it has been decided at law, not that the power has been defectively executed in regard to some attendant circumstance, but that a *different power not given* has been executed, leaving the *power actually given* unexecuted(*q*).

9. Cases occur sometimes in which the defendant at law

(*n*) *Ball v. Storie*, 1 Sim. & Stu. 210.

(*o*) *Jalabert v. Duke of Chandos*, 1 Eden, 372.

(*p*) *Cockerell v. Cholmeley*, 3 Russ. 565; 1 Russ. & My. 418.

(*q*) See also on this 2 Sug. Pow. 138, 139.

has good *matter of defence*, but owing either to the form of the action, or to the stage at which the proceedings have arrived, he is unable to avail himself of it at law.

Thus, in a very late case, A. had obtained judgment at law against B. for 600*l.* and costs, and on a return to the writ of execution of *nulla tenet*, distrained for the amount. Afterwards B. brought an action against A. and the sheriff for irregularity in the distress, and recovered 600*l.* damages; B. owed other moneys to A. but was insolvent, and was about to tax his costs, and issue execution against A.; and, owing to the forms of proceeding at law, the judgment of A. could not be set off against the damages obtained by B. Under these circumstances, Sir L. Shadwell, V. C. granted an *ex parte* injunction to restrain B. from suing out execution, A. undertaking to satisfy the lien of B.'s attorney (*r*). B. afterwards moved to dissolve. But his Honor the Vice Chancellor refused the motion, and said it appeared to him that the case was the same as if B.'s judgment had been paid and he had been proceeding at law to take A. in execution: that the judgment was in point *of fact* satisfied, and though the Court of King's Bench would not, in point *of form*, allow A.'s judgment to be set off against B.'s, yet it was right that it should be done in equity.

Where, however, the cross demand is purely legal, as an acquisition by purchase of bills of exchange accepted by the plaintiff at law; and where the case is not that the defendant at law cannot have by possibility any benefit of it at law, but only cannot have the benefit of it as a set-off by reason of the time when he has acquired it, as where after verdict he acquires a cross demand exceeding the amount of the verdict, equity will not interfere by injunction to prevent the plaintiff at law from having the benefit of his verdict by taking out execution (*s*). For equitable set off is when a defendant at law has a cross

(*r*) *Williams v. Davies*, 2 Sim. 461.

(*s*) *White v. O'Brien*, 1 Sim. & Stu. 551.

demand, of which from its nature he cannot have the benefit at law, and there is no ground for it, if the defendant could have the benefit of his cross demand at law. But in a case where the plaintiff had a charge on the defendant's estate, which was decreed to be raised, and the defendant had a claim for 800*l.* against the plaintiff, for which he brought an action and obtained judgment, an injunction was granted to restrain him from issuing execution, as being inequitable (*t*). And where there was a decree for an account in a legatee's suit, and on taking the account a charge was brought in by the executor against the plaintiff that he had received certain sums, and on its being referred to arbitration, the arbitrator found a balance due to the plaintiff the legatee, although no regular award was made, it was held that the executor ought to be restrained from bringing an action against the legatee for the sums he had received, until the master should make his report (*u*).

Where the matter confessed by the answer of the defendant in equity would be a good defence at law if proved, the Court will not restrain him from proceeding up to judgment. But if the bill be also for relief, to have an instrument founded on alleged fraud cancelled, and some of the defendants have not put in their answers, which may disclose a defence of which the plaintiff in equity could not avail himself at law, then equity will stay execution (*x*).

10. It is not, however, to be understood, that equity will in all cases interfere merely upon the fact that injustice is done by the forms of proceedings at law. The distinction is, that the Court will interfere where the party using all due diligence and availing himself to the utmost of the assistance of a Court of law, is unable to obtain justice by reason that the Court of law cannot take full cognizance of the case; but that it will not interfere to disturb the

(*t*) *Austin v. Tynte*, 2 Mol. 486.

(*x*) *Houlditch v. Nias*, 8 Price, 689.

(*u*) *Milner v. Goolden*, 1 Cox, 197.

proceedings of a Court of law, when the matters on which the party grounds his claim to relief in equity might have been brought before a Court of law, and are of such a nature that that Court would have taken notice of them, and the party has by his own act or neglect incapacitated himself from obtaining justice in such Court (y). This distinction is very clearly laid down by Lord Redesdale in the case of *Bateman v. Willer*. In that case the plaintiff filed his bill to restrain a solicitor, whom he had employed, from proceeding on a verdict obtained for the amount of a bill of costs. It appeared that the evidence on which the plaintiff in equity founded his application, might have been brought before the Court of common law, and might have been taken into consideration by the jury, if the plaintiff had complied with the rules of practice of the Court of common law, and Lord Redesdale refused the injunction, saying, "The attention of parties in a Court of law can scarcely be made a subject for the interference of a Court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a Court of law, a matter capable of being discussed there, and over which the Court of law had full jurisdiction (z)."

And where in a case of contract for the sale of an estate,

(y) *Bateman v. Willer*, 1 Sch. & Lef. 201; *Longard v. Holbeck*, 1 Sch. & Lef. 201.
 (z) *Forster v. Willer*, 1 Sch. & Lef. 201.
 Rose, 42.

the vendor could not clear it of an incumbrance to the amount of nearly half the purchase money, and other difficulties existed, on which considerable negotiation took place, and the vendor brought his action for breach of contract, but afterwards withdrew the record, not from any reluctance to have the matter decided in a Court of law, but from finding that in that stage of the case he could not support his action; and afterwards the purchaser brought an action to recover the deposit, and obtained a verdict, on which the vendor moved for an injunction;—Lord Eldon, without deciding whether the Court would ultimately decree specific performance, refused the injunction, saying, that under the circumstances the Court ought to adopt the principle adopted by the parties themselves, and leave them in the situation in which they had placed themselves (*a*). Where the defendants in equity have not only the superior legal title but also a good equity, the Court will not restrain them from proceeding on such their legal title. Thus in a case where a settlement of leasehold was made by a trader in consideration of 1000*l.* his wife's fortune, on himself for life, or until bankruptcy, with remainder in either event to his wife, and he afterwards became bankrupt, the trustees of the settlement were not restrained from bringing ejectment to recover possession of the leasehold (*b*).

Although a Court of law will not grant a fresh trial where a party has not proved his case, merely to enable him to get fresh witnesses to prove it, and although a Court of equity would not interfere on such a ground simply, yet it is otherwise in equity, where by the answer itself new facts appear which were not before the Court of law, and which possibly the defendant at law could not get at

(*a*) *Wood v. Bernal*, 19 Ves. 220.

(*b*) *Higginson v. Kelly*, 1 Ball & B. 252; a settlement by a trader of his wife's property on himself for life, or

till bankruptcy, and after either event to his wife, is good against creditors; *Ex parte Hinton*, 14 Ves. 598; *Ex parte Meaghan*, 1 Sch. & Lef. 179.

at law, without the discovery from the defendant in equity. In such a case equity will interfere by injunction (*c*).

11. Under the second branch of this section are to be noticed cases where, incident to the legal title, is some equitable liability. In such cases equity will restrain the exercise of the legal right, if the party is not in a position to answer the equitable liability incident to it.

1. Thus although a mortgagee has a right to proceed on his mortgage at law, and on his bond at law at the same time, yet his right is fettered and controlled by the corresponding right of the mortgagor not to be obliged to pay back the money on his bond, if he is in danger of not getting back his title deeds. The mortgagee can have nothing but on condition of reconveying and giving up the title deeds which he has received. And therefore, where a mortgagee died without any heir that could be discovered, the Court restrained the executor of the mortgagee from proceeding at law to compel payment of the money, there being no heir who could reconvey (*d*). And where a mortgagee having got possession of the mortgagor's title deeds, lodged them with an attorney, who claimed a lien upon them and refused to give them up, the mortgagee was restrained from proceeding at law upon the collateral security (*e*). In regard to a mortgagee's right of proceeding at law after foreclosure, the general rule is, that a mortgagee, having foreclosed, may nevertheless proceed at law upon his collateral security (*f*); but he thereby opens the foreclosure, and lets in the equity of redemption of the mortgagor (*g*). Lord Thurlow indeed appears in a later case (*h*) to have denied the latter part of the doctrine, holding, that where a mortgagee forecloses and sells the estate fairly and without collusion, and for the best price, it will then ap-

(*c*) *Hardy v. Fenn*, 2 Cox, 12.

(*g*) *Doddard v. Wightman*, 1 Eq.

(*d*) Case cited by Lord Redesdale,

Ch. Ab. 317.

1 Sch. & Lef. 177.

(*h*) *Tink v. Hartley*, 2 Br. C. C.

(*e*) *Schubert v. Sibb*, 1 Sch. & Lef. 176.

125, and note clearly in 2 Dick. 725.

(*f*) *Joynt v. Hill*, 2 Dick. 551.

pear whether it has produced the amount of the money reported due, and to the extent of what it does not, the mortgagee has a right, and so (his Lordship said) *it was established* to bring an action against the mortgagor to recover the difference. But Lord Eldon does not appear to have approved the doctrine of Lord Thurlow. In *Perry v. Barker* (i), the defendant, a mortgagee, had foreclosed in November 1798, and sold the estate in February 1799, for less than the mortgage debt and interest, and afterwards brought an action upon the bond for the difference. Lord Eldon, referring to the case before Lord Thurlow, said, "the action in that case must have been for the whole money, for it was an action upon the bond. But consider how it would be, if the action was upon the covenant, laying the damages for the remainder of the money? It is not very consistent to say you open the foreclosure, desiring him to bring in only the remainder of the money; for the consequence of opening the foreclosure would be, that a new account should be taken of the principal and interest, and the money to be brought in upon that footing should be all or nothing." His Lordship, however, in consequence of the opinion of Lord Thurlow, granted the injunction, the plaintiff paying the money into Court. The cause afterwards came to a hearing before Lord Erskine, C. (k), who was of opinion that the foreclosure was opened, but upon the ground of the length of time elapsed since the sale, and the inconsiderable extent of the defendant's demand, and that consequently it was scarcely possible that the mortgagee should seek to put himself in circumstances that would allow the mortgagor to redeem, his Lordship held the proper decree to be a perpetual injunction. "If (he said) in this instance there was any probability that this mortgagee could get the estate back again, he ought to have a time limited for that purpose. Then he ought to tender a conveyance, and the mortgagor should have a time to redeem. But under the circumstances of this case,

(i) 8 Ves. 527 a.

(k) 13 Ves. 198.

the mortgagee's demand being so inconsiderable, the proper decree is an injunction.' It is not easy to reconcile Lord Erskine's expression that the foreclosure was opened, with the judgment, which proceeded on the ground that the mortgagee was not in a position to open the foreclosure. On the whole, however, the doctrine to be collected from these authorities seems to be, that where a mortgagee has foreclosed, and the estate does not produce as much as the mortgage debt and interest, he may generally, if he will submit to open the foreclosure, and to account as mortgagee, and can *de facto* do so, bring an action upon his collateral security; but that if he has put himself in such a position that he cannot *de facto* open the foreclosure and reconvey, he will be restrained from proceeding at law.

Although a mortgagee, as such, has a right to all his remedies, and therefore to an action at law, yet where by contracting to purchase the mortgaged premises, he has made his character of mortgagee conditional, depending on whether he is purchaser or mortgagee, the Court will enjoin him from proceeding at law, putting the mortgagor, however, upon terms (*l*). But in a case where the assignee of a bankrupt mortgagor, against whom the mortgagee had put in a distress on the mortgaged premises for the arrears of interest, agreed, as assignee, to pay such arrears to the mortgagee out of the produce of the sale of the effects; although afterwards the fiat was annulled, and although the mortgagee was in treaty for the purchase of another estate of the bankrupt, on which he might have retained his debt out of the purchase money, yet the Court refused to restrain him from pursuing his legal remedy against the assignee. And it seems that if the agreement for purchase had related to the mortgaged premises, instead of to others, it would have been the same (*m*).

Again, though a mortgagee has an undoubted right in

(*l*) *Dunwood v. Pown*, 2 My. & K. 168. (*m*) *Pell v. Stables*, 2 My. & K. 334.

general to file a bill for foreclosure, yet in a case where lands in Jamaica were in mortgage, and the mortgagor had filed a bill in the Court of Chancery in England to redeem, and a decree had been taken for an account, the Court restrained the defendants from proceeding in a foreclosure suit in Jamaica, saying, that the plaintiff had a clear equity to be protected against a double account of the amount due on the mortgages (*n*).

II. A husband has a species of legal title to a legacy bequeathed to his wife, inasmuch as the executors must pay it to and take the receipt of the husband (*o*): and therefore, although no action will lie at law by the husband against the executor (*p*), yet a suit may be instituted by him in the Ecclesiastical Court (*q*) for the legacy; but equity will, at the instance of the wife, restrain such proceedings in the Ecclesiastical Court, because that Court has no jurisdiction to enforce an equitable settlement upon the wife (*r*).

A tenant is bound by implied contract to keep his landlord's property distinct from his own during his tenancy, and to leave it so at the end of such tenancy; and therefore, where a lessee of charity lands had mixed them with her own lands, her representative was restrained from bringing an ejectment, to turn the party entitled to the charity lands out of possession of lands belonging to the lessee, until it should be ascertained by a commission what land belonged to the charity (*s*).

12. It may be observed also, that where an unfair advantage would be given to a party by the exercise of the powers

(*n*) *Beckford v. Kemble*, 1 Sim. & Stu. 7.

(*o*) See 2 Williams on Ex. 1015.

(*p*) *Deeks v. Strutt*, 5 Term Rep.

690.

(*q*) See Williams on Ex. 1483.

(*r*) *Mealis v. Mealis*, 5 Ves. 516 a,

note 94; and 1 Dick. 373, under the name of *Meals v. Meals*. See also 1 Atk. 491, 516; and 2 Rop. Legs. 2d edit. 694.

(*s*) *Attorney-General v. Fullerton*, 2 Ves. & B. 263.

of an act of parliament, the Court will interfere: thus, under the 2 & 3 Will. 4, c. 125, for granting relief to the West Indies, the commissioners have power to advance money to planters, and priority is given to their securities over all others affecting the lands charged, and they have no power to advance without having priority; therefore where the commissioners under this act were about to advance money on the security of two plantations, one of which was already mortgaged, the Court granted an injunction to restrain the commissioners from making, and the mortgagor from receiving a loan (t). It may be that a party may not be entitled to have an agreement specifically performed in equity, and may nevertheless be entitled to damages at law for the breach of the agreement; but where a party has waived his strict legal right, and submitted to a decree in equity, which would not have been made except on the footing of his waiving such legal right; or where a decree has been made for specific performance, expressly on the ground that the defendant had waived the literal performance of the agreement, *ex gratia* the time appointed for the performance of the contract, equity will restrain him from bringing after such decree an action against the plaintiff in equity (u).

13. Although equity will, as we have seen, relieve against legal rights inconsistent with equity and good conscience, it is not to be understood that equity will, in all cases, interfere merely on the ground of *hardship*; there must be an equity on one side unmet by any commensurate equity on the other; and therefore, where parties covenant with each other, and the legal rights of each under the covenants entered into by the other are absolute and unconditional, equity will not interfere. Thus where the lessor of a mill and machinery covenanted to repair the outside of the building, and during the last fourteen years of the

(t) *Berradaile v. Brickwood*, 1 Y. & Coll. 60.

(u) *Reynolds v. Nelson*, 6 Madd. 200.

lease to *replace the machinery when it should become incapable of use by long service*, and could no longer be rendered workable; and the lessee covenanted to pay rent and to repair the inside of the building, and to repair the machinery *so long as it would last, or could be rendered workable by repair*; and there was no exception as to accidents by fire. The landlord insured, and the premises were burned down and destroyed. It was held that the lessee was bound to pay rent, and had no equity to compel the landlord to rebuild with the money received from the insurance office, but must take his remedy at law upon the covenant. And therefore, the Court refused to restrain the landlord from proceeding at law to recover rent, although he had not done and refused to do any but colourable repairs (*v*). It may be remarked, that the mutual covenants *as to the machinery* in the lease were extremely improper; for, as it was observed by the Court, their literal effect was defeated by the fire. The lessee was not bound to erect new machinery under any circumstances, but simply to keep the existing machinery in repair; and the lessor was to put up new machinery, not when it was destroyed while still fit for use, but when it became unfit for use from long service. Such an event as a fire, therefore, cut away the ground of both covenants, and rendered the performance of either impossible.

So in *Holtzapfell v. Baker* (*x*) it was decided, in opposition to some earlier authorities (*y*), that where a tenant holds under covenant to repair the premises, and keep them in repair, reasonable use and wear *and damage by fire excepted*, and the premises are burned down, the landlord will not be restrained from bringing his action for rent, because he has not rebuilt. Lord Eldon said, he could not see the equity, and put the case thus: "Suppose a demise for seven years, at a rent of 100*l.* per annum, the tenant to

(*v*) *Leeds v. Cheetham*, 1 Sim. 146.

(*r*) 18 Ves. 115.

(*y*) *Brown v. Quilter*, Amb. 619;
Camden v. Morton, 2 Eden, 219.

repair in all cases except fire, not to be liable in that case; and the landlord stipulating that he will be content at the end of seven years to take the land without the house. If they choose to make that agreement, why should they not? If it can be maintained that the meaning of such a contract is, that if a fire should happen the rent should not be paid, there is no occasion to enter into equity. But if that is not the effect of the contract at law, I cannot see any equity.

And in a case where a promissory note for 100*l.* was given for the premium to be paid with a youth on placing him with an attorney for a certain number of years, the attorney covenanting to teach him, in consideration of the 100*l.* and his services, and he ran away long before the end of the period, the Court would not restrain the holder of such note from proceeding at law, although the master had refused to take his apprentice back (2).

11. Under this division fall also cases where, although the plaintiff at law or in another Court has a title to set up some pecuniary claim, the final state of the claims of the parties can only be ascertained by a complicated account. Thus, in *O'Connor v. Spaight* (a), the defendant had demised premises to the plaintiff, and rent was to be paid at a certain rate for every acre the premises should be found to contain. Upon this demise the tenant entered into possession, and no rent *eo nomine* was paid, but for sixteen years various payments were made by the tenant to the landlord by bills and otherwise. And then the landlord brought ejectment for nonpayment of rent. The tenant filed his bill for an account and an injunction, alleging that on taking the account a balance would appear in his favour. Lord Redesdale thought it a proper case for equity, on the ground that so complex an account could not be properly taken at law, and until the account was taken, the justice of the case could not appear. But an

(2) *Coff v. Busch*, 5 Price, 297.

(a) 1 Sch. & Lef. 305.

injunction will not be granted to restrain an action brought by a tradesman against his customer on a bill for goods, where the ground of asking the injunction is merely that the goods were unfit for use, and where therefore the case is not matter properly of account or of set-off, but matter of damages (*b*).

And the claim that a solicitor has against his client for professional service is not such matter of account as will give him an equity to restrain the client from proceeding against him at law on a promissory note given as a security for the balance, if any, against the solicitor on coming to a settlement (*c*). However if a bill for an injunction to restrain proceedings at law on a note, states that *there is an unsettled account* between the parties, it is not demurrable *quoad* the prayer for an injunction (*d*).

(*b*) *Glennie v. Imri*, 3 You. & Coll. 436.

(*d*) *Wattleworth v. Pitcher*, 2 Price, 46.

(*c*) *Hirst v. Peirse*, 4 Price, 339.

CHAPTER III.

Where Relief is sought against Forfeiture or Penalties incurred by the Breach of Covenants or the Neglect of other Legal Liabilities.

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| <ol style="list-style-type: none"> 1. <i>General Principle of the Jurisdiction, and in Particular as to Relief against Penalties in Bonds, &c.</i> 2. <i>Distinction between a Penalty and such, and as stipulated Damages.</i> 3. <i>Discussion of the Cases where the Breach of Condition is wilful, or where not susceptible of Compensation in Damages certain. And herein of Sanders v. Pope, and Davis v. West.</i> 4. <i>General Result of all the Cases that there is generally no Relief against Breach of any Covenant</i> | <ol style="list-style-type: none"> <i>in a Lease, except of Covenant to pay Rent.</i> 5. <i>Cases of Exception to this Rule.</i> 6. <i>What is, and what is not, Waiver of his Right by the Party entitled to the Benefit of a Covenant.</i> 7. <i>As to Ship Registry Acts.</i> <ol style="list-style-type: none"> 1. <i>No Relief where neglect to comply with the strict Terms of the Ship Registry Acts.</i> 2. <i>But Relief may be granted as between the Parties, one of whom has the better Equity, to prevent the other from completing his Legal Title.</i> |
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1. A NUMEROUS class of cases is to be considered under the head of relief against penalties and forfeitures. As where a person binds himself under a penalty to do a certain thing, and then omits to do it; or where a lessee covenants to do or not to do certain acts, with a clause of re-entry for breach of the covenant, and then commits such breach.

In some cases of this nature, equity will under circumstances relieve against the strict legal consequences of breach of the obligation by the party bound. The general principle has been stated in an old case, that equity has

jurisdiction to relieve against the consequences of breach of condition not wilful, whether precedent or subsequent, wherever the matter lies in compensation (*a*).

By compensation must however be understood not mere pecuniary damages, but replacing the parties in the position in which they were before the breach. This principle is constantly applied to cases of bonds or other instruments with penalties, where the penalty is inserted merely to secure the enjoyment of a collateral object. And there the enjoyment of the object is considered as the principal intent of the deed, and the penalty only accessional, and to secure the damage really incurred (*b*).

But where the penalty is inserted not as such, but as *assessed damages*, or a *compensation* fixed by the parties for the non-performance of the condition, then equity will not interfere (*c*).

The principle of such cases is, that equity confines parties to the substantial intention of their agreement, and will interfere for that purpose, where at law such intention would be overlooked for the letter of the agreement, but not otherwise. Therefore where it is plain that the penalty is *intended* by the parties as a fixed or assessed amount of compensation for the wrong done by the breach of the condition, equity will not interfere. But where the penalty is plainly intended only as *a security*, there equity interferes by analogy to the case of a mortgage become absolute at law, and confines the party to that which it was the intention of the instrument to secure to him, the thing contracted for, *or* the amount of damage actually incurred by him by the non-possession of it.

Thus in a case where a bond was given to secure the performance of articles, to build a bridge and keep it up for a given time, and the penalty of the bond was the exact

(*a*) *Hayward v. Angell*, 1 Vern. 222. (*c*) *Rolfe v. Peterson*, 2 Br. P. C. 436; *Woodward v. Gyles*, 2 Vern.

(*b*) *Stoman v. Walter*, 1 Br. C.C. 119.
418.

sum for which the builder contracted to build the bridge, and he failed to perform his agreement, it was decided that it was still a penalty and not liquidated damages, and the obligee was restrained from bringing an action at law for the penalty, and an issue *quantum damnicatus* ordered (d).

And where a man bound himself in a penalty not to trade as a brandy merchant within certain limits, it was held that the penalty was not a price to be paid for infraction of the agreement, and the plaintiff at law was restrained from taking out execution on a judgment for the amount of the penalty, and an issue *quantum damnicatus* directed (e).

2. The great difficulty in cases of this sort is to distinguish where the penalty will be held a mere security, and where it will be held stipulated damages. On this Mr. Jarman, in one of his valuable notes to Mr. Bythewood's Precedents (f), makes the following observations:—

“(1). Where a sum of money, whether in the name of a *penalty* or otherwise, is introduced in a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and therefore only to secure the damage really incurred. This rule has long been established in Courts of equity.

“(2.) Where a deed contains covenants, or an agreement contains provisions, for the performance of several things, and then a large sum is stated at the end, to be paid upon the breach of performance, that must be considered as a *penalty*.

“(3.) Where the payment of a smaller sum is secured by a larger (g).

(d) *Erington v. Ayres*, 2 Brown C. C. 341.

(e) *Hardy v. Marlin*, 1 Cox, 26.

(f) Vol. iii. p. 411.

(g) *Aslet v. Duff*, 2 Atk. 238.

“(4.) Where the word penalty is specifically used, it is merely as a security.

“(5.) A Court of equity will relieve against a penalty upon a compensation; and a Court of law will not enforce it beyond the actual damage sustained; but where there is a covenant in a deed to pay a *particular liquidated sum*, neither a Court of equity nor a Court of law can make a new covenant for a man (*h*), nor is there any room for compensation or relief; as in leases containing covenants for ploughing up a meadow. If the covenant be ‘not to plough,’ and there be a penalty, a Court of equity will relieve against the penalty, and direct an issue of *quantum damnificatus*. And in an action of covenant at common law a breach must be assigned, and the extent of the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative; no room for any relief against it; no compensation; it is the substance of the agreement (*i*).

“(6.) Where the precise sum therefore is not of the essence of the agreement, the *quantum* of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of a marriage contract, in which case it might not be possible to ascertain precisely what damages the person in respect to whom the contract is broken has sustained, and therefore the contracting parties agree to pay a stipulated sum; in such case the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due *in integro* on a breach of the contract.”

Equity sometimes interferes to restrain proceedings at

(*h*) *Reilly v. Jones*, 8 Moore, 244.

Aylet v. Dodd, 2 Atk. 238; *Farrant v.*

(*i*) *Lowe v. Peers*, 4 Burr. 2229;

Olmus, 3 Barn. & Ald. 692.

law on bonds, where the bond is to do something on a given day, and it is not done on that day. Thus, although the creditor of an intestate has a right to sue on the administration bond of the administrator (*k*), when a breach has been committed, yet where the breach was that the inventory was not exhibited on the day mentioned in the bond, but was exhibited within a few days of that date, and the bill alleged that the reason of the delay was, the embarrassed state of the intestate's affairs, the Lord Chancellor granted an injunction, putting, however, the plaintiff on terms (*l*).

And here may be mentioned an old case, in which an injunction was granted to restrain proceedings on a bond, where it appeared that the bond contained an intricate and insensible condition, and the defendant requiring the plaintiff to seal a release, he desired time, to be advised thereon, whereupon the defendant refused time and proceeded at law; the plaintiff being afterwards ready to seal a release, he obtained an injunction against the defendant's proceeding on the bond (*m*).

3. Whether equity would interfere to relieve against a wilful breach of condition, or against a breach of condition not wilful, when it cannot be ascertained with certainty what is compensation, has been formerly much discussed. And although the practice of the Court is now fully settled, I conceive that it will not be improper to devote a few pages to a review of the authorities, in order to show the grounds on which the actual rule of the Court stands.

In an early case (*n*) Lord Alvanley, M. R., expressed an opinion, confining the interference of equity to cases of accident, fraud, surprise, or ignorance *not wilful*; his Honor said, "at law a covenant must be strictly and

(*k*) See *Williams Ex.* part 1. book 1. *lary*, 1 Cox, 399.

v. chap. 4, and the cases there referred to.

(*m*) *Raines v. Rainer*, Cary, 78.

(*n*) *Eaton v. Lyon*, 3 Ves. 690.

(*l*) *Thomas v. Archbishop of Canter-*

literally performed ; in equity it must be really and substantially performed, according to the true intent and meaning of the parties, so far as circumstances will admit. But if by unavoidable accident ; if by fraud, by surprise, or ignorance not wilful, parties may have been prevented from executing it literally, a Court of equity will interfere ; and upon compensation being made, the party having done every thing in his power and being prevented by the means I have alluded to, will give relief.” And in a subsequent part of the judgment his Honour said, “It is now perfectly understood, that even in the purchase of an estate, if money has been covenanted to be paid at a given day, at law no action will lie ; but if the party can show that he took the means of paying it, and has been prevented by accident not in his power, the Court will dispense with the strict performance of it, because, as it was formerly said, it is not of the essence of the contract. But it may be of the essence of the contract, and the party shall not avail himself of equitable circumstances, unless he shows that there has been no wilful neglect or misconduct on his part(o).” But the terms, not wilful, and unavoidable, must be taken in this limited sense, that the Court will consider ignorance wilful, where a person neglects the means of information which ordinary prudence would suggest, and will consider accident not unavoidable, which reasonable diligence might have prevented. And accordingly, in a case where a person took an assignment of a lease for three lives, with a covenant for renewal from time to time on the falling of each life, on the payment of a small fine, provided application for renewal were made within six months after the life dropped, and he did not make such application for more than six months after the death of one of the *cestuís que vie*, the Court refused to interfere, although it appeared that the *cestuy que vie* was an obscure person whose death might easily be overlooked ; the plaintiff’s own allegations

(o) 3 Ves. 692 ; see also on this doctrine, 2 Price, 210 ; per the Vice-Chancellor, in *Rolfe v. Harris*.

showing that he had not made those inquiries and used those precautions for learning whose lives were in the lease, and obtaining early information of the deaths of the *c'estui que vie*, which reasonable prudence would have suggested, and reasonable diligence would have required (*p*).

The next case is *Wadman v. Calcraft* (*q*), first heard before Sir William Grant, M. R., and afterwards on appeal by Lord Eldon. In that case the Master of the Rolls treated the relief in equity as confined to breach of covenant to pay *rent*; his Honour said, in the course of his judgment, "in this case there are several other covenants, and it seems admitted that relief is not to be given in equity against a forfeiture occasioned by the breach of those covenants;" and Lord Eldon, on the appeal, admitting that equity could relieve against forfeiture for non-payment of rent, said, "that clearly there could be no relief against the breach of other covenants."

Not long after this case the question was elaborately discussed by Lord Erskine, C., in *Sanders v. Pope* (*r*). That was a case of demise of premises for a term of years, at the annual rent of 35*l.*; covenant by lessee to lay out 200*l.* in the first five years of the term in repairs, and not to assign without license; and a clause of re-entry for non-payment of rent, or breach of any of the covenants. The lessee did not expend any part of the 200*l.* in repairs, and thereupon the lessor brought ejectment. The defendant at law obtained an injunction at the Rolls, and afterwards the cause came on before Lord Erskine, C., who decided in favour of relief. His Lordship, after reviewing the cases preceding *Eaton v. Lyon* (*s*), and assuming, it should seem (*t*), that they establish the principle that a forfeiture shall not bind, where the thing may be done afterwards,

(*p*) *Harries v. Bryant*, 4 Russ. 89.

(*q*) 10 Ves. 67.

(*r*) 12 Ves. 282.

(*s*) *Cage v. Russell*, 2 Vent. 352;
Verbitate v. Duke, Amb. 511, *Hack*

v. Leveard, 9 Mod. 91; *De Scarlett v. Denwell*, 9 Mod. 22; *Waser v. Mocate*, 9 Mod. 112.

(*t*) See 12 Ves. 290; see also 12 Ves. 476.

or any compensation made for it, expressed himself as follows: "One case has since occurred which appears to break in upon the principle; though the decision is perfectly right in the particular instance upon the circumstances; but some words appear to have fallen from Lord Alvanley, which go against all that has been laid down in a series by preceding judges; and which, if they are taken in their full extent, would create considerable uncertainty. In that case (*u*) there were great laches and fraudulent conduct by the tenant, whose bill, after lying by for several years to see whether it would be for her interest to apply, was very properly dismissed. But Lord Alvanley, in the passage that has been stated at the bar (*v*), expresses himself in terms that would confine the jurisdiction very much. If the covenant is broken with consciousness that it is broken, that is, if it is wilful—not by surprise, accident, or ignorance—still if it is a case where full compensation can be made, these authorities say, not that it is imperative upon the Court to give the relief, but that there is a discretion. I do not stop to consider what should be the rule with regard to paying money on a particular day, farther than to say, I do not assent to that proposition, that though a full and clear compensation can be made, a Court of equity has no jurisdiction, or ought not in any instance to exercise it if it exists. I cannot agree that it is necessary the non-performance of the covenant should have arisen from mere accident or ignorance. Suppose the lessee had expended to the amount of 199*l.*, knowing that the whole sum required had not been applied: the fact that the expenditure was short by that trifling deficiency existing; and not to be accounted for by ignorance or accident: can it be represented as consistent with justice or good sense, that, the lessee having by calling on his friends attached considerable custom to the house, the lessor, finding the premises by the conduct and industry of the lessee more valuable, should

(*u*) *Eaton v. Lyon*, cited *ante*, p. 80. to the expressions of Lord Alvanley,
 (*v*) The Lord Chancellor alluded cited *ante*, p. 80.

be permitted to turn him out, taking advantage of the circumstance that 1*l.* or 5*l.* less than the stipulation had been laid out, or that the money had been laid out five days too late, though he might be placed in the same situation and obtain complete possession of all for which he contracted? That would apply equally to a beneficial lease upon a great expenditure of money, or for a long term of years. The last authority, the order of the Master of the Rolls (*x*), continuing the injunction in this case, supports the jurisdiction."

The next case is *Davis v. West* (*y*), which was a case arising upon breach of covenant by non-payment of rent, and Lord Erskine there again laid down the same doctrine, advertng to his previous decision in *Sanders v. Pope* in language from which it is to be inferred that his Lordship would not have made that decision, if he had not considered himself bound by authority.

The doctrine of *Sanders v. Pope* rests then, not on principle in opposition to the preceding authorities, but on the assumption that they had established the principle acted upon in that case. It does not appear, however, on examination of those authorities, that they go the length of supporting Lord Erskine's decision in *Sanders v. Pope*, and this appears to have been the opinion of Lord Eldon (*z*), and of Sir Thomas Plumer, V.C. (*a*); and in the case of *Bracebridge v. Buckley* (*b*), Richards, B., said he thought the case of *Hack v. Leonard* did not sustain Lord Erskine's decision.

In *Cage v. Russell* (*c*), the breach of the condition was not by the party claiming relief, but by a person over whom he had no control (*d*). The case was this; A., a married woman, having power to devise certain lands, devised them

(1) The fact that Sir W. Grant made an order for an injunction only appears incidentally by the argument for the plaintiff in reply, see 12 Ves. 208. On what representations he made that order does not appear.

(y) 12 Ves. 475.

(z) See his Lordship's observations in *Reynolds v. Pitt*, 19 Ves. 134.

(a) 2 Price, 210.

(b) 2 Price, 200; see *ibid.* p. 217.

(c) 2 Ventr. 352.

(d) See on this point, 19 Ves. 140.

to her executors to pay to her son 500*l.* when he should attain twenty-one ; proviso, that if his father should not give her executors a sufficient release of the goods and chattels in a certain house, the gift to her son to be void, and the 500*l.* to go to the executors. After A.'s decease, the executors tendered a release to the father, who refused to execute it, and then the son filed his bill against the executors and the father, *to compel payment of the 500*l.**, and the execution of a release. The executors insisted on the refusal of the father as an absolute forfeiture ; but the father was then willing to release ; and the Court decreed payment of the 500*l.*, saying, " It was the standing rule of the Court that forfeiture should not bind where a thing may be done afterwards, or any compensation made for it, as where the condition was to pay money *or the like (e)*." Now on this case it is to be observed, first, that the circumstance that the party affected by the breach of the condition did not commit it, and had no power to prevent it, was strong to create an equity in his favor ; and, secondly, that the condition was merely that the father should execute a sufficient release, without saying within any particular time. It does not appear at all clear that the refusal of the father at first was such a breach of the condition as to work a forfeiture. But admitting that there was a forfeiture, still the point decided does not go the length of establishing more than that equity will relieve where the thing to be done can be *specifically* done ; to use the words of the Court, as where the condition is to pay money *or the like* ; and in the principal case, the subsequent release of the particular goods and chattels was a specific performance of the thing to be done. This case is clearly no authority for the broad position, that wherever compensation, in the sense of pecuniary

(e) But where there was a devise, with a conditional limitation over, if the devisee should not execute a certain release within a given time, and

he did not comply with the condition, the Court sustained the limitation over, *Simpson v. Vickers*, 14 Ves. 341.

compensation, can be given, equity will relieve the party bound by a condition, against wilful breach of it.

The next case relied on by Lord Erskine is *Descarlett v. Dennett* (e). His Lordship appears to have inferred, from the expressions used by Sir Joseph Jekyll in that case, that the learned judge used the word damages in the ordinary wide sense of damages to be ascertained by a jury; but the expressions of Sir J. Jekyll do not appear by any means to warrant such an inference. His Honour did not say affirmatively, in *Descarlett v. Dennett*, that wherever the injury will admit of full compensation the Court will relieve; but negatively, that the Court could not relieve the non-performance of a covenant or condition, the prejudice in breach of which cannot be estimated in damages. And he goes on afterwards to explain in what sense he uses the word damages, viz., *some certain damages*. "The case of an entry," he says, "for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages." And the point decided in the case was, that relief could not be given against an ejectment brought for breach of a covenant not to suffer persons to make use of a way over part of the lands demised—a breach, the loss arising from which could be compensated by damages uncertain, that is, damages to be assessed by a jury, as well as any other loss. Unless, therefore, the Court meant, in the dictum referred to, to use the word damages in a much more restricted sense than the ordinary one, the decision and the dictum in *Descarlett v. Dennett* would be inconsistent with each other.

Hafer v. Mocato (f) proceeds on the same principle; for there it is clear that a jury could have recompensed by damages. But the Court refused to relieve, on the ground that it was unknown *what should be the measure of the damages*; and on these cases Lord Eldon, in *Reynolds v. Pitt*, observes, that the Court must have meant compensa-

(e) 9 Mod. 22.

(f) 9 Mod. 112.

tion estimated by some rule as certain as that of principal and interest ; not by the casual opinion of a jury, but by some certain rule (*g*).

The case in *Ambler* (*h*) does not go the length of supporting Lord Erskine's decision. In that case, which was upon breach of covenant not to underlet for more than a certain term without licence, Lord Northington stated his opinion in favor of granting relief, but expressly guarded himself against making any immediate decree upon it ; and his opinion proceeded upon two principles, 1st, that the lease in that case was not a breach of the condition, because under the circumstances it could not be for a time certain (*i*) ; 2dly, that if it were in fact a breach, yet the plaintiff taking the estate as executor was like the case of an heir taking a freehold, and ought to have notice of the condition in order to affect his interest by way of forfeiture for the breach of the condition ; the plaintiff in equity was the executor of the original lessee, and alleged that he had not the lease in his possession, and was a stranger to the proviso against underletting. It is true that his Lordship said, " he took the rule to be, that in all cases where a person has broken a condition and forfeited a penalty, equity will relieve if there can be a *compensation*, and that he thought the Court might relieve where a tenant cuts down timber." But it is to be observed, that this opinion was extra-judicial, and that assuming his Lordship would have grounded a decree upon the opinion expressed by him in reference to the circumstances of the case before him, it appears by what has been already stated, that that decree would have proceeded upon positions not requiring the application of any such broad rule as that expressed by him in the latter part of his

(*g*) 19 Ves. 140, 141.

(*h*) *Northcote v. Duke*, Amb. 511.

(*i*) The clause was, that lessee for lives should not let for more than seven years without licence, and lessee's

executor made a lease without licence for fourteen years. The Court thought it was not a lease of necessity for more than seven years.

observations. There is, therefore, the single case of *Hack v. Leonard* (j), which can be considered a direct authority for the decision in *Sanders v. Pope*, and that case has been expressly disapproved (k). In respect to *Sanders v. Pope*, it has been disapproved by Lord Eldon in *Hill v. Barclay* (l), and the case in the Exchequer (m) is so closely similar to it, that it is difficult not to consider it as positively overruled. *Brucebridge v. Buckley* was a case in which the plaintiff had covenanted as lessee to lay out within twelve months on the premises, 1000*l.* in good and substantial repairs, and he did not repair within the limited time; the case was argued before the whole Court of Exchequer; all the cases, including *Sanders v. Pope*, were cited; and it was held by three of the Barons, the fourth dissenting, that there could be no relief against the forfeiture accruing from breach of such a covenant, on the ground that the Court could not ascertain precisely what should be compensation (n).

4. On the whole, from the language of the authorities, the principle appears to be this, that where the thing to be done, the not doing of which has worked the forfeiture at law, can be *specifically* done, so as to put the party *bonâ fide* and entirely in *statu quo*; or the injury can be compensated by a sum certain, or by damages capable of being estimated by some *certain rule* by the Court, there equity will relieve; and I am not aware of any case since *Sanders v. Pope* and *Hart v. Davis*, in which the rule has gone beyond this.

It must also be observed, that as between lessor and lessee in practice the Court has never been induced to con-

(j) 9 Mod. 90. In that case the breach of covenant was neglecting to thatch a barn; and the Lord Chancellor relieved against a verdict in ejectment.

(k) 18 Ves. 61; 19 Ves. 141.

(l) 15 Vet. 402.

(m) *Brucebridge v. Buckley*, 2 Price, 200.

(n) See further on the subject of relief against forfeiture for breach of condition, the cases cited in 1 Eq. Ab. cap. 17 B; see also *Taylor v. Popham*, 1 Br. C. C. 108.

sider any cases of forfeiture as strictly within the principle, except those arising on breach of covenant to pay rent. Thus, although it is difficult to see how the reasons urged against the interference of equity in cases of forfeiture for breach of covenants to repair, not to assign, and other covenants of a like nature, are less applicable to forfeiture for breach of covenant to pay rent (*n*), yet the doctrine is firmly settled since *Hill v. Barclay* (*o*), that the Court will not restrain a landlord from proceeding at law upon a forfeiture for wilful breach of covenant to repair, or not to assign. *A fortiori*, it will not interfere to relieve against breach of covenant to insure, which is stronger against the tenant than the omission to repair; because in the latter case the landlord may, by using due diligence, see to the observance of the covenant; but in the former the landlord must rely on the lessee for the fulfilment of his obligation (*p*). And this has been carried so far, that in a late case, although the lease was for 999 years, and it was clear and indeed admitted that the reversion was of no value to the lessor, Sir L. Shadwell, V. C., refused to sustain an injunction against ejectment brought for breach of a covenant to insure, on this ground, that the principle is that the Court will not relieve, except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been in if there had been no breach; and that in the case of a breach of covenant to insure, the landlord cannot, by any payment of money, be put into the same situation as he was entitled to be under the covenant (*q*). And the refusal to grant relief in cases of breach of covenant goes also this length, that where a lease contains covenants on the part of the lessee, and a covenant for renewal on the part of the lessor, if the rent is duly paid and the covenants observed, with a clause

(*n*) Lord Eldon has spoken of the principle of relief against forfeiture in the case of non-payment of rent, as utterly without foundation, 18 Ves. 58.

(*o*) 16 Ves. 402, and 18 Ves. 56.

(*p*) *White v. Warner*, 2 Mer. 459.

(*q*) *Green v. Bridges*, 4 Sim. 96.

of cesser and re-entry if the covenants should be broken ; and the lessee during the term commits such breaches of covenant, that the Court would not, during the term, have prevented the lessor from taking advantage of them, had he been constant of the breach, it will not interfere after the expiration of the term to restrain him from bringing ejectment nor to compel him to grant a renewal, if he had no notice of the breaches till after the expiration of the term (r).

5. Relief has, however, been given in a case where the landlord was a lunatic, and an ejectment was brought by the committee for breach of a covenant to repair ; the Court granted an injunction, on the assumption that it was a case in which a judicious landlord would not have taken advantage of the breach, for it would be an administration in lunacy extremely prejudicial to the estates of lunatics, if too hard measures were adopted with the tenants. The breach of covenant does not appear to have been obstinate (s). This case can however hardly be called in strictness an exception to general rule, for the Court was not adjudicating between the hostile claims of landlord and tenant ; but acting in lunacy, put itself in the place of the lunatic, and on his behalf as landlord, refused to take advantage of the forfeiture.

Under very special circumstances also an injunction may be granted to relieve against forfeiture for breach of covenant to repair. Thus in the case of *Hannam v. South Lambeth Waterworks Company* (t), where the plaintiff was lessee of the defendants, with a covenant to repair, and in default, forfeiture of the lease ; and the plaintiff being in treaty for compensation with another company, which had parliamentary powers to take the premises, allowed pending such treaty the proper time for repairing within the cove-

(r) *Thompson v. Guyon*, 5 Sim. 65.
See also the observations on this subject, 4 Jarm. Conv. 3d edit. 367.

(s) *Ex parte Vaughan*, 1 Turn. & Russ. 434.

(t) 2 Mer. 61, see the n. (a), 65.

nant to elapse, the Lord Chancellor thought that in such a case, where what was insisted on was, that the tenant should repair premises pending a treaty with a third party, in the result of which, if completed, those premises would immediately after be pulled down, an injunction would be proper; and an injunction to restrain ejectment was accordingly granted, the plaintiff, the lessee, undertaking to obey such orders as the Court should make, on the defendants applying to have repairs, and also to obey the orders of the Court on any application of the defendants, if it should appear that they had been required to accept for their interest as lessors from the third parties, a less compensation than they would have obtained, if the premises had been repaired according to the terms of the lease.

6. Equity will also relieve where the party entitled in consequence of the breach of covenant, by his own conduct waives the breach. Thus in a case where the obligee of a bond wrote to the obligors in these terms, "If the interest of the money be regularly paid, it is not my intention to call in the amount for four years from this day ——" The interest was regularly paid with the exception of two periods, on one of which it was paid one, and on another two days after the proper day. But the obligee accepted such payments, and accepted subsequent regular payments of interest: it was held on appeal by the Lord Chancellor, 1st, that the memorandum amounted to an undertaking binding on the obligee; and 2dly, that where money is tendered after it is due, and the person to whom it has been tendered does not think fit to refuse it, it is a waiver of the objection; and that it must be taken as a regular payment, if the person receives it the day after without making any objection. On these grounds the obligee was restrained from suing the obligors at law (*u*).

But where the assignee of a lease gives a bond for the performance of the covenants, and then breaks the cove-

(*u*) *Norton v. Wood*, 1 Russ. & My. 178.

nants and abandons the possession, the assignors do not waive their right to proceed on the bond, by entering into possession and sub-letting (1). And so where there is a covenant against carrying on certain trades, waiver by the landlord as to one trade is not a waiver as to all. Thus in a case where a lease was granted with a covenant against keeping an open shop; permission by the lessor to carry on a particular trade, was held not to amount to a licence to carry on any other trade; and under such a covenant, the lessees having carried on for several years different trades without molestation, a sub-lessee who afterwards carried on another trade, was held not entitled to an injunction to restrain an ejectment brought for breach of the covenant (y). The lessors were a corporation, and the sub-lessee having, with the knowledge of some of the governors of the corporation, expended considerable sums in repairs and adapting the premises for his trade, a question arose whether notice to such governors was notice to the corporation. The Court seems to have inclined to consider the corporation bound, but did not decide the point (z).

Before concluding this subject it must be observed, that if a landlord bringing ejectment has stated in his particulars several breaches of covenant, and the court of law has heard evidence only on one, on which a verdict has been given for the plaintiff, although that one is such that equity might possibly relieve against it, yet if the others are such as equity would not relieve against, and the landlord in his answer swears he could prove them, an injunction will not be granted to stay further proceedings at law, as the only effect of that would be to send the parties to try other breaches, which if the answer is true could be proved, and in respect of which equity could not interfere (a).

(1) *Anderson v. Barley*, 1 Russ. 313.

(y) *Macher v. Foundling Hospital*,
1 Ves. & B. 188.

(z) *Ibid.*

(a) *Leat v. Lord Ramelagh*, 3 Ves.
& Bea. 24.

7. I. It is quite clear that no relief against forfeiture of the legal title to a ship can be had in equity, where the forms prescribed by the Ship Registry Acts have not been complied with (*b*), unless, perhaps, in the case of fraud; and even then the preponderance of judicial opinion appears to be in support of the doctrine, that equitable relief cannot be obtained (*c*).

II. But the Registry Acts do not prohibit an equitable interest, or oust the jurisdiction of equity to grant relief, as between two parties, one of whom has the better equity, where the forms prescribed by the Registry Acts have, so far as the circumstances admit, been complied with, and can be fully complied with by the aid of the interposition of equity. This was decided in a case where A. having mortgaged his share of a ship to B., afterwards mortgaged it to C., without notice of B.'s mortgage; C. paid off the debt of B., who refused to deliver up his bill of sale, and afterwards re-assigned to A. At the time of the bill of sale to C., the ship was out at sea, and had been so from a period antecedent to the first mortgage, having been duly registered, and having on board her certificate. If C., the mortgagee, could not obtain the certificate to cause to be indorsed thereon his bill of sale, within ten days after the arrival of the ship, his equitable title would of course have been void, for want of compliance with the Registry Acts, and the defendants, the assignees of the mortgagor, (who had in the mean time become a bankrupt,) having in them the legal title, would have been enabled, if equity did not interfere, to complete their legal title, and thus destroy the equitable title of C. The Court, after an elaborate investigation of the subject and taking time to consider, held, that the Registry Acts merely nullified a sale both at law

(*b*) *Hibbert v. Rolliston*, 3 Br. C. C. 571, and see the *n. l*; *Thompson v. Perry*, 1 Mad. 39; and see *Curtis v. Leuke*, 6 Ves. 739; see also 34 Geo. 3, cap. 68.

(*c*) *Mestaer v. Gillespie*, 11 Ves. 621; *Newnham v. Graves*, 1 Mad. 399, *n.*; *Barker v. Chapman*, *ibid.* 400, *n.*

and in equity, where the forms had not been complied with; but did not, as between claimants who have equally attended to the forms of the Act, take away the equitable title to relief which in other respects one may have against the other; that there was nothing in the Registry Acts to prevent the mortgage of a ship; that in the principal case the mortgagor was bound to give validity to his bill of sale to C., and ought not to have taken an assignment from B. after his mortgage had been paid off by C.; and therefore the Court said it would grant an injunction to restrain the defendants from obtaining the certificate of registry of the ship, or from doing any act to prevent C. from procuring his bill of sale to be indorsed on the certificate, until the defendants should pay him what was due thereon. But as the ship had been by consent sold subject to the consent of the Court, the money was ordered to be paid to the plaintiff (*d*).

And it has been determined, that where a bill of sale is made of a ship which is at sea, the property is vested immediately in the vendee, if all the formalities of the Registry Act are complied with, so far as they can be, at the time of the transfer, subject only to be divested by the neglect of the vendor to make the indorsement on the certificate of registry, within the ten days after the return of the ship into port. And therefore a power of attorney given by the vendor at the time of the transfer, is not avoided by his bankruptcy, but the attorney may perform the indorsement, notwithstanding such bankruptcy. The bankrupt himself might do it if he had given no power of attorney (*e*).

(*d*) *Thompson v. Smith*, 1 Mad. 395. (*e*) *Dixon v. Leart*, 3 Mer. 322.

CHAPTER IV.

Of the Jurisdiction in general.

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| <ol style="list-style-type: none"> 1. Courts of Equity act on the Person proceeding, and not on the Court in which he is proceeding. 2. Jurisdiction to stay Proceedings in the Admiralty Courts; in the Courts of Scotland and Ireland; and generally in any foreign Court. 3. Jurisdiction to stay Proceedings in other Courts of Equity. 4. And in the same Court. 5. Distinction where the concurrent Suits are not precisely for the same Matter. 6. Cases where Equity will restrain Proceedings in other Courts, on the mere ground of the Court having drawn the Matter within its own Jurisdiction. 7. Staying Proceedings at Law after Decree in a Creditors' Suit. <ol style="list-style-type: none"> 1. General Rule that Equity will stay Proceedings at Law after, but not before, Decree for an Account. 2. By whom the Motion may be made. 3. Discussion of the Question, whether Priority in the Decree is essential. 4. Effect on the Jurisdiction, of | <p style="text-align: right;"><i>the Nature of the Suit in Equity.</i></p> <ol style="list-style-type: none"> 5. Distinction between the Cases where the Judgment at Law is <i>de bonis testatoris</i>, and where it is <i>de bonis testatoris et si non de propriis</i>. 6. Discussion of Mr. Williams' Strictures on the latter Distinction. 7. General Result of the Cases on the Three foregoing Points. 8. Jurisdiction as to restraining Actions against the Bank of England. 9. Jurisdiction to relieve against an Award. 10. Jurisdiction to restrain a Party from proceeding by Extent under an Act of Parliament. 11. Of restraining Proceedings at Law against the Officers of the Court, where they have acted under irregular Orders; or irregularly under Orders in themselves regular. 12. General Result of the Cases. 13. Jurisdiction to restrain the Officers of the Court from seeking Redress in any other Court. 14. Whether Equity has Jurisdiction to restrain the Subject from Petitioning the Legislature. |
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THERE are a great many cases in which the question has been, not whether, admitting the general jurisdiction, the merits were such as to call for the interposition of the

Court by injunction; but whether, in reference to the particular kind of case, equity had jurisdiction to interfere by injunction.

I propose in this chapter to discuss these cases.

1. The principle on which Courts of equity act in restraining the prosecution of judicial proceedings in other Courts, is to act on the *person* proceeding, and not on the Court in which such person is proceeding. In the language of an old case, they do not impeach the jurisdiction of the other Court, (as in the case of a prohibition), where, if the Court proceeds, the judge is guilty of a contempt; but the injunction stays the party from proceeding, and at the same time the Court of equity supposes the other Court to have jurisdiction, but does not think proper, from some collateral circumstances, to suffer the party to apply and take the benefit of that jurisdiction (*a*). Upon this principle it seems immaterial where or what the Court is in which proceedings are sought to be restrained, provided the *party* sought to be restrained is amenable to the jurisdiction, and is capable of being acted on by the process of contempt of the Court; and the extension of the jurisdiction of equity to stay proceedings in other Courts besides Courts of common law, and in foreign Courts as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible, as it is firmly established in practice.

Instances of the interference of the Court of Chancery to stay proceedings in the Ecclesiastical Courts, are to be found in very early cases. In the one already referred to (*b*), a party had long acted under a will, and had admitted the validity of the probate in proceedings in Chancery, and in the House of Lords; and then sought, without

(a) *Sheffield v. Duchess of Buckingham*, 1 Atk. 628, see p. 630, see

also *Bunbury v. Bunbury*, 3 Jur. 644, the observations of the Lord Chan-

cellor, p. 610.

(b) *Sheffield v. Duchess of Buckingham*, 1 Atk. 628.

bringing forward any new evidence, to controvert the validity of the will in the ecclesiastical Court. An injunction was granted to restrain the party from proceeding in the ecclesiastical Court. And in another case before the same learned judge, where a woman of mean circumstances and bad character entrapped an infant ward of chancery into a marriage, under circumstances amounting to a gross contempt of the Court, and afterwards obtained a decree for alimony in the ecclesiastical Court, and sentence of excommunication against her infant husband and his guardian; the Court, on a petition being presented by the guardian for a *prohibition* to restrain proceedings upon the decree and the excommunication, refused the prohibition, expressly admitting the jurisdiction of the ecclesiastical Court, but held that having regard to the jurisdiction of the Court of Chancery for the protection of its wards, and to the conduct of the wife, the Court had jurisdiction to restrain *the wife by injunction* from proceeding, and accordingly granted an injunction (*c*).

2. In modern times injunctions have been granted to restrain proceedings in Courts of various jurisdiction. Thus in a late case, where a woman had instituted a suit in the Admiralty Court, to recover a sum of money for wages as cook of a small merchant vessel; the owners defended on the ground that she was the wife of the captain; but evidence of this fact could not be obtained until the suit had advanced beyond that stage at which fresh evidence could, according to the rules of the Admiralty Court, be admitted. On these facts being verified by affidavit, an injunction was granted to restrain further proceedings in the suit until answer or further order, the plaintiff in equity paying into Court the sum recovered and the costs in the Admiralty Court (*d*). On similar principles, probably, it has been held, in a case where a woman was in possession of her husband's personal

(*c*) *Hill v. Turner*, 1 Atk. 516.

(*d*) *Jarvis v. Chandler*, 1 Turn. & Russ. 319.

estate as his administratrix, and claimed an equitable interest in the whole, that she was entitled to an injunction to restrain the next of kin from proceeding for a distribution in the ecclesiastical Court, where her equitable title could not be noticed (*e*). An attempt was made in *Glancott v. Lang* (*f*) to deny the jurisdiction of equity to restrain proceedings in the Admiralty Court upon a *bottomry bond*, on the ground that the matter was properly cognizable in the Admiralty Court, which itself acted upon equitable principles, and had power to moderate the amount recoverable upon the bond if the case required it; but the Court held the jurisdiction clear, and said, "such an instrument, whether it be a bottomry bond or any other species of bond, is a security for money alleged to have been obtained under circumstances which a Court of equity ought not to give effect to, and the plaintiffs come here asserting their equity to get rid of the obligation, whether as against the possessor or against the property, in the ordinary course of administration of equity in this Court (*g*)."
 The Court has proceeded even a step further in a very late case, in which proceedings having been taken in the Admiralty Court on a bottomry bond, given under circumstances affording great suspicion of fraud, Lord Langdale, M. R., admitting that the Court of Admiralty had jurisdiction to determine on the validity of the bond, and sufficient power to investigate the circumstances, and to adjudicate, restrained the proceedings, on the ground that it appeared the proceedings instituted in the Court of Chancery were adapted *more* conveniently, directly, and effectually to sift the matter, than the particular form of proceeding then adopted in the Admiralty Court (*h*). It is not necessary, in order to induce the Court to interfere, that it should find a case which would entitle the plaintiff to relief *at all events*. It is quite sufficient if the Court finds upon the

(*e*) *Backhouse v. Hunter*, 1 Cox, 342.

(*f*) 3 My. & Cr. 451.

(*g*) See also *Deben v. Lyall*, *ibid.* 453, *note*.

(*h*) *Duncan v. M'Almont*, Rolls,

Mich. T. 1840, 5 Jurist, 202. The defendants appealed from this order, and the case is now waiting for the Lord Chancellor's judgment.

pleadings and upon the evidence a case which makes the transaction a proper subject of *investigation* in a Court of equity (i). A party is not deprived of his equity for an injunction, because another Court, assuming jurisdiction to decide on the equities of the case, has refused to stay its own proceedings. Thus in a case where A. applied for a loan of 700*l.* to B., one of two executors B. and C., and gave two bonds to both executors for 400*l.* and 300*l.*; he received the 400*l.* but not the 300*l.* But he allowed his bond for 300*l.* to remain for four years in the hands of the executors without calling for the money, although C. had a promissory note for 300*l.* of the testator's in his hands. C. afterwards became insolvent, and then B., for the first time, was informed that the 300*l.* had not been advanced, and was requested to give up the bond; he refused to do so, and brought an action against A. on the bond; A. then procured a release of the action from C., and applied to the Court of law to stay proceedings; but that Court refused the application. On this state of circumstances Lord Eldon granted an injunction on the terms of the plaintiff paying the 300*l.* into Court, with the interest and costs at law (k).

But though the Court of Chancery has jurisdiction to stay a suit in other Courts, notwithstanding those Courts may have necessary powers for doing full justice, yet such jurisdiction will not always be exercised. Thus in a case before Lord Hardwicke, where the captain of a trader came for an injunction to stay a suit in the Admiralty Court, on the ground that the defendants, who were privateers, had taken his papers, and made him sign one on which he must in that Court be cast; Lord Hardwicke said, to exercise jurisdiction in such a case would entirely defeat the act of parliament in relation to prizes, as upon every taking of a trader the owners might come for an injunction on such a pretence. And besides, the Court of Admiralty could by their own rules put such a case in a course of

(i) *Glascott v. Lang*, 3 My. & Cr. 451.

(k) *Whitfield v. Ralfe*, Coop. 89.

inquiry, and do full justice; and he refused the injunction (*l*).

So in another case before the same learned judge, where the defendant having instituted a suit in the ecclesiastical Court for subtraction of tithes, the defendant did not there plead any discharge, but filed a bill to establish a modus, and upon that bare suggestion of a modus moved for an injunction. The Lord Chancellor said, that the plaintiff might have pleaded it in the ecclesiastical Court, and if that Court would not determine on the same evidence as a court of law would have done, that was proper ground for a prohibition from the Court of King's Bench, and refused to interfere (*m*).

An injunction will also be granted till the hearing in a suit for the administration of assets, to restrain a legatee from suing in the ecclesiastical Court for his legacy (*n*). It must be observed, however, as matter of practice, that the common injunction does not apply to stay proceedings in the ecclesiastical Court, nor, it seems, in the Admiralty Court. To stay proceedings in these Courts, an injunction must be moved for specially (*o*).

It is quite clear that a Court of equity has no jurisdiction to interfere against obtaining probate of a will of personality, on the ground of the will having been obtained by fraud or forgery (*p*). But there is a distinction where the case is not merely that the will has been obtained by fraud, but that fraud has been practised against the next of kin, after the death of the testator, so as to lead him into doing such acts as would enable the party practising the fraud to obtain probate of a forged will. Under such circum-

(*l*) *Anon.* 3 Atk. 350.

(*m*) *Rotheram v. Fanshawe*, 3 Atk. 628.

(*n*) *Stonehouse v. Stonehouse*, Dick. 98; *Smith v. Kempson*, *ibid.* 769; see also *Anon.* 1 Atk. 491.

(*o*) *Anon.* 1 P. Wms. 301; *Reed v. Bowyer*, 1 Price, 101; *Macnamara*

v. Macquise, Dick. 223.

(*p*) *Kerrick v. Pringle*, 1 Str. 673, *notis*; 7 Br. P. C. 457, *Stephenson v. Gardner*, 2 P. Wms. 286, 1 Ves. sen. 287; and see Red. Pl. 257; and 1 Will. Ex. 38; see also *Nelson v. Oldfield*, 2 Vern. 76; *Plume v. Beale*, 1 P. Wms. 389.

stances Lord Hardwicke interfered in a circuitous manner by decreeing the defendant to consent in the ecclesiastical Court to a revocation of probate (*q*).

There are several instances of injunctions to restrain proceedings in the Courts in Scotland and Ireland (*r*). And in *Lord Portarlington v. Soulby* (*s*), where the action was brought in Ireland, the question of jurisdiction was elaborately discussed by Lord Brougham, C., who said that the Court had jurisdiction, not upon any ground of superintending authority residing in the Court of Chancery over courts in Ireland, but on the ground that the defendants were within the power of the Court; his Lordship observed, in the course of his judgment, "in truth nothing can be more unfounded than the doubts of the jurisdiction; that is grounded, like all other jurisdictions of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if for instance, (as in *Penn v. Lord Baltimore* (*t*)), it can decree the performance of an agreement touching the boundary of a province in North America, or as in the case of *Toller v. Carteret* (*u*), can foreclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party within the limits of its jurisdiction, from doing any thing abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the institution or prosecution of an action in a foreign Court (*x*)."

Upon the same principle the Courts of equity have

(*q*) *Barnesley v. Powel*, 1 Ves. sen. 284.

(*r*) *Wharton v. May*, 5 Ves. 71; *Beauchamp v. Marquis Huntley*, Jac. 546; *Harrison v. Gurney*, 2 Jac. & W. 563; *Campbell v. Houlditch*, cited by the Court in *Lord Portarlington v.*

Soulby, 3 My. & K. 108; *Bushby v. Munday*, 5 Mad. 297; *Kennedy v.*

E. Cassilis, 2 Swan. 313.

(*s*) 3 My. & K. 104.

(*t*) 1 Ves. sen. 444.

(*u*) 2 Vern. 494.

(*x*) 3 Myl. & K. 108.

under circumstances restrained parties within their jurisdiction from proceeding in other foreign Courts, as for instance, in the Court of the Lord Mayor of the city of London (y). And in a very late case, before Lord Langdale, M. R. (z), the defendants in equity had instituted proceedings in the Court of Demerara, involving, in the opinion of the Court, questions depending on the law of Holland and also on the law of England, and further questions of account which could only be taken in this country; under these circumstances his Lordship restrained the defendants from prosecuting proceedings in Demerara, putting however the plaintiff on terms to submit to and carry into effect any order which the Court might think fit to make in respect to the proceedings in Demerara (a).

On the other hand, where proceedings at law are instituted for the purpose of drawing into question matters of foreign law which have already been adjudicated upon by the foreign Court, equity will assist the jurisdiction of the foreign Court by restraining such proceedings at law. This appears by an old case, extracted from Lord Nottingham's MSS., in which the plaintiff sought a perpetual injunction to stay actions brought by the defendants, who were English subjects, against the plaintiff, for seizing goods of the defendants, for trading in Iceland contrary to alleged privileges of the plaintiff there. The defendants in equity claimed a right to trade there by virtue of the articles of peace between this country and Denmark, and by virtue of long custom. The plaintiff proved letters patent from the King of Denmark for the sole trade of Iceland, and the seizure of the goods by virtue of that patent. A sentence of the proper Danish Court followed the seizure, which sentence was confirmed by the Chancellor of Denmark. The sentence so confirmed had been actually executed, and a payment of two-thirds actually made to the King of Denmark. Lord Nottingham said,

(y) *Barber v. Goodair*, 11 Ves. 78; (a) See the same case on appeal, *Siecking v. Behrens*, 2 Myl. & C. 581. 3 Jur. 644.

(z) *Bunbury v. Bunbury*, 1 Bea. 318.

that after all this, to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English had a right to trade to Iceland, was monstrous and absurd; and decreed a perpetual injunction (*b*).

3. A doubt seems till lately to have existed whether the Court of Chancery will enjoin a party from proceeding in another Court of *equity* (*c*); in the case referred to, several legatees had instituted *a suit in the Exchequer for the* administration of the testator's estate, and pending that suit, some of the residuary legatees filed their bill in Chancery, and obtained a decree. On a motion made by the executor, the defendant in Chancery, to restrain the other legatees from proceeding with the suit in the Exchequer, an order was made, by consent of the plaintiff in the Exchequer, that the proceeding in the Exchequer should be stayed; and that the plaintiff in the Exchequer should be restrained from commencing any other suit in any manner touching the legacies claimed by them. They were to go in under the decree in Chancery, and be paid their taxed costs of the exchequer suit up to the time of their having notice of the decree in Chancery, and their costs of the motion for an injunction. This point was, however, determined in a subsequent case (*d*); in that case there were suits in England for the execution of the trusts of the will of the testator, who had estates in England and Ireland, and a decree had been made in those suits. An incumbrancer upon the Irish estates having commenced a suit in equity in Ireland, on behalf of himself and other creditors, and continuing it after the decree in the English suit, while at the same time he carried in a charge under that decree, the plaintiff in one of the English causes moved in those

(*b*) *Blad v. Bamfield*, 3 Swanst. the note of the learned reporter.

604. (*d*) *Clarke v. Earl of Ormonde*, Jac.

(*c*) *Jackson v. Leaf*, 1 Jac. & W. 108 and 546.

229, per Lord Eldon, p. 232; and see

causes for an injunction to restrain the creditor from proceeding in the suit instituted by him in Ireland, and the order was made; costs to the plaintiff in the Irish suit being allowed out of the estate up to the time when he had notice of the decree in the English suits; but the costs of the application for the injunction were thrown on him. For as he was aware of the decree, and had voluntarily come in and proved under it, he ought not to have put the plaintiff in the English cause to the expense of making such an application.

So in *Harrison v. Gurney* (e), and *Booth v. Leicester* (f), an injunction was granted to restrain proceedings in Chancery in Ireland, where there was a suit in Chancery in this country for the same objects, in which a decree had been made (g). And in a very late case (h) it was held, that where a suit has been instituted in chancery, and a decree obtained in it, the Court will restrain proceedings instituted in another Court, whether English or foreign, in respect of the very same matter. It is not to be understood that in no case can a party pending proceedings under a decree be permitted to pursue such auxiliary remedies, but only that they must not be taken without the leave of the Court, on a special case made (i); and a motion for an injunction in such a case may be made by the defendant against the plaintiff.

In *Harrison v. Gurney*, the motion was made in the English suit by the plaintiff in that suit. In *Booth v. Leicester*, and in *Wedderburn v. Wedderburn*, the English suit and the foreign suit were both instituted by the same plaintiff; and in both these cases, the application for an injunction was made in the English cause on behalf of the defendants. In *Booth v. Leicester* the application was by petition in the cause (j).

(e) 2 Jac. & W. 563.

(f) 1 Keen, 579.

(g) See *Boulter v. Boulter*, 2 Beav. 196, note (a).

(h) *Wedderburn v. Wedderburn*, 9

Law Journal, N. S. 205; 2 Beav. 208.

(i) *Ibid.*

(j) See also *Mosher v. Reed*, 1 Ball & B. 318; *Wilson v. Wetherberd*, 2 Mer. 496.

It has been said, indeed, on the subject of concurrent suits, that as a general rule, where two Courts have concurrent jurisdiction over the same thing, that Court in which the suit is commenced is entitled to retain it; and this was urged in an old case (*k*), but the Court did not accede to the doctrine. The rule is now, that where a party is proceeding at law and in equity at the same time, and in respect of the same matter, the defendant may, within a certain time after putting in his answer, alleging that fact, obtain an order that the plaintiff may elect whether he will proceed at law or in equity, and for an injunction, if he shall elect to proceed in equity (*l*). And if it is clear to the Court, or admitted, that the proceedings are for the same matter, the injunction may be obtained with the order to elect (*m*). And if a party is proceeding in a Court in this country and also in a foreign Court, and afterwards elects to proceed in the foreign Court, he will be restrained from continuing to proceed in the suit instituted here (*n*).

4. It is well settled that a Court of equity will exercise jurisdiction to restrain other proceedings in the same Court. Thus, if one creditor files a bill in Chancery, and afterwards another files a bill, and the executor answers the second directly and a decree is obtained, then it is competent for the executor himself to restrain the first plaintiff from proceeding. And when a creditor is thus stopped, the course is to pay him the costs that he has incurred prior to his having notice of the decree (*o*).

5. But if the suits are for different objects, as, if the suit in which a decree has been made is an administration suit simply, and the second is a creditors' suit for an account, and to *have the assets marshalled*, a benefit which the creditors could not have under the first decree, the second

(*k*) *Earl of Newburg v. Wren*, 1 Vern. 220.

(*l*) See Smith's Pract. 2d edit. pp. 561 and 562, and the cases there cited, and 1st general order 9th May 1839.

(*m*) *Hogue v. Curtis*, 1 Jac. & W. 449.

(*n*) *Pieters v. Thompson*, Coop. 294.

(*o*) *Jackson v. Leaf*, 1 Jac. & W. 229; *Paxton v. Douglas*, 8 Ves. 520.

suit is not improper (*o*). So in a case of two concurrent creditor suits against the administratrix of a trader, the bill in the one merely praying the ordinary decree for an account, and the other charging that the administratrix had carried on the trade and applied the intestate's estate to her own use, and praying that she might be held liable for what she might have received but for wilful default, the Court refused to stay the second suit (*p*). The distinction of these later cases appears to have been acted upon in a case where the proceedings were in different Courts of equity, so far back as 1791. There a trust fund was settled on the father for life, remainder to the children; and in default of issue, then as to part of the premises, to the father absolutely. The father instituted a suit in the Exchequer, alleging that there was no issue, and praying to have that part of the fund which was limited to him in default of issue; and subsequently, one claiming as issue instituted a suit in Chancery, applying to the whole fund. The Lord Chancellor refused to stay the suit in the Exchequer, but restrained the trustees from transferring the fund (*q*).

It may be observed here, that an injunction granted by the Court of Chancery in Ireland on an interlocutory application to restrain proceedings at law in that country, is not *binding* on the Court here, in an application for an injunction to restrain proceedings in the King's Bench here, in respect of the same matter, though it may be an *authority*. But a *final judgment* of that Court, in a case in which it has concurrent jurisdiction, might, it seems, be entitled to a different consideration (*r*).

6. There is a numerous class of cases in which equity will restrain proceedings at law, if proceedings have been previously taken in equity, and have proceeded to a certain

(*o*) *Pott v. Gallini*, 1 Sim. & Stu 206.

(*p*) *Bush v. Combs*, *Kemp v. Combs*, MS., Rolls, Nov. 1840. The Court however intimating, that if the plaintiff in the second suit prosecuted it, he must do so at his own risk, an order

was ultimately taken by arrangement for an injunction on terms.

(*q*) *Bulbeck v. Ballock*, 3 Swanst. 698.

(*r*) *Ball v. Storie*, 1 Sim. & Stu. 210.

point, although originally the defendant might have had a right to proceed at law; the Court treating it as an infringement of its jurisdiction to carry elsewhere a matter once drawn within its jurisdiction, and on which it can do complete justice. This jurisdiction seems to have been early assumed; for we find in a very old case, that an injunction was granted to restrain ejectment, on the ground that it was touching the same premises for recovery of which a suit was already depending in Chancery (s). And in another case in Cary we find mention of an injunction being granted to restrain proceedings in the ecclesiastical Court on a matter already the subject of a suit in Chancery (t).

On this principle it has been decided in a late case that if, in a suit for administration, the usual decree has been made and no claim of any debt or damages having been brought in, the master has made his report, and the cause has been heard on further directions, and the executors have paid in their balances;—the lessor of the testator will be restrained from bringing an action against the executors for breaches of covenant, on the ground that it may be ascertained by the master as well as it could by a jury, whether any breach of covenant has been committed, and what is the amount of the damages (u). So a party against whom a decree has been made in a suit for specific performance, may be restrained by special injunction from bringing an action, on the express ground that it is an infringement of the rules of the Court to bring an action while the Court is working out a decree; for where a proceeding is before the Court, and the Court has full power to do justice, a party ought not to resort to any other tribunal (x). If there be delay in the master's office in working out a decree, the party complaining should apply to the Court for

(s) *Bull v. Bodie*, 1 Dick. 1, cited from the Reg. Lib. This is doubtless the same case which is mentioned in Cary, p. 50, and cited by Lord Henley under the name of *Bill v. Body*; see Eden on Injunctions, 35.

(t) *Parre v. Tipelady*, Cary, 73.

(u) *Sutton v. Mashiter*, 2 Sim. 513.

(x) *Frank v. Basnett*, 2 My. & K. 618. See also *Mocher v. Reed*, 1 Ball & Bea. 318.

leave to bring an action, and the Court may, under circumstances, direct such action to be brought (y).

Although a plaintiff may undoubtedly originally bring an action to recover his costs for business done in a suit in equity, yet, if an order is obtained in the suit, referring it to the master to tax his costs, he thereby admits the jurisdiction of that Court to enforce payment of the taxed bill by process of contempt, and the Court will not allow him, after the bill has been taxed, to proceed in his action (z).

7. I. With regard to staying proceedings at law against the real or personal representatives of a testator or intestate, where a creditors' suit has been instituted in Chancery, it is well settled as a general rule, that the Court has jurisdiction to restrain proceedings at law, after a decree has been made for the administration of the assets. The principle is, that the decree is in the nature of a judgment for all creditors, and that as it cannot be pleaded at law, the Court of Chancery will enjoin a creditor (a); and the rule, it is said, has existed ever since Lord Hardwicke's time at least (b). But the Court will not stop a creditor at law, unless there is a decree under which he can go in (c). Nor will a preliminary reference to take accounts of a testator's estate, under the 5th order of 10th May, 1839, have the effect of a decree for account, for the purpose of sustaining an injunction to restrain a particular creditor from proceeding against the executor at law (d).

The rule is very clearly stated by Lord Redesdale in *Largan v. Bowen* (e). His Lordship said, "Courts of equity will not restrain proceedings of creditors at law

(y) *Frank v. Barnett*, *supra*.

(z) *Walton v. Johnson*, 2 Sim. 456; *Re Dillon*, 2 Sch. & Lef. 110; *Ex parte Bellott*, 4 Mad. 379; *Barr v. Wiggins*, 4 Sim. 125.

(a) *Paston v. Douglas*, 8 Ves. 520; *Banks v. Reynolds*, 1 Br. C. C. 183; *Moorice v. Bank of England*, 2 Bro. P. C. 465, Muf. Pl. 168; *Harcastle v. Chettle*, 4 Br. C. C. 163; *Hayward*

v. Creditable, 2 You. & Col. 43; *Martin v. Martin*, 1 Ves. sen. 211. See also 3 Swans. 541; *Farlow v. Nelson*, 11 Price, 95.

(b) *Paston v. Douglas*, *supra*.

(c) *Rush v. Higgs*, 4 Ves. 638.

(d) *Teague v. Richards*, 9 Law Journal, N. S. 293.

(e) 1 Sch. & Lef. 296.

against executors to obtain payment of debts, merely on a bill filed by other creditors to carry the trusts of the will into execution, *until there is a decree*. But from the moment of the decree the Court proceeds on the ground that the decree is a judgment in favour of all creditors, and that all ought to be paid according to their priorities as they then stand; *and that the Court cannot execute its own decree if it permits Courts of law to alter the course of payment (f)*.

But although the pendency of a creditors' suit is no bar before decree to another creditor proceeding at law, yet if a receiver has been appointed, his possession is the possession of the parties to the suit, and therefore a judgment creditor, whose judgment is posterior to that of a judgment creditor a party to the suit, will not be allowed to bring an action on his judgment (*g*). And it has been determined that if the declaration at law has been delivered, so that the common injunction only stays execution, it will be extended to stay trial (*h*).

II. The injunction in a creditors' suit to stay another creditor from proceeding at law may be obtained either by the executor or administrator (*i*), or by another creditor (*j*), or by a legatee (*k*), or by the heir (*l*).

Formerly it was thought necessary to file a separate bill for an injunction (*m*), but now the injunction may be obtained by motion in the existing suit for administration, upon notice to the creditor. This practice is said to have originated in a case of *Cleverley v. Cleverley*, before Lord Rosslyn, and has been since constantly followed (*n*).

The practice, when an executor moves after decree in a

(f) 1 Sch. & Lef. 299.

(g) *Thackaberry v. Christian*, 1 Hog. 109; and see *Anon.* 1 Hog. 69.

(h) Dick. 668.

(i) *Paxton v. Douglas*, 8 Ves. 520.

(j) *Brooks v. Reynolds*, 1 Br. C.C. 183.

(k) *Clarke v. Lord Ormonde*, Jac. 108.

(l) *Martin v. Martin*, 1 Ves. sen. 211; and see also on these points Eden on Injunctions, 32; Williams' Executors, 1360, *et seq.*

(m) *Brooks v. Reynolds*, 1 Br. C.C. 183; and see Jac. 124.

(n) 8 Ves. 520; and see Jac. 124.

creditors' suit to stay proceedings at law by another creditor, is, that the executor must state by affidavit, if he has not stated it by his answer, what are the assets; and the Court will then make the order on the money being brought into Court, paying the creditor at law his costs till notice of the decree and the costs of the application (o). The latter costs have been however sometimes refused (p).

The cases already cited on this subject show that an injunction to stay proceedings at law will be granted after, and cannot be granted before, a decree has been obtained in the suit in equity. It remains yet to be considered—Whether an injunction can be granted if the judgment at law has preceded the decree in equity;—How far the jurisdiction is affected by the nature of the suit in equity;—And how far it is affected by the kind of judgment obtained at law.

III. Whether in order to warrant the interference of the Court it is material that the decree should have been made before the judgment at law, was much discussed in a late case (q), before which the point seems not directly to have arisen, except in *Drewry v. Thacker* (r). In that case actions had been brought upon certain bonds against an administratrix, who before the trial agreed to withdraw her pleas; the plaintiff to take judgment, and that no bill in equity should be filed, or other proceeding taken, for setting aside the judgment, or restraining the plaintiff from levying execution. And the plaintiff was to be paid by certain instalments, and was not to take out execution except in default of payment of such instalments. This was in 1818, shortly after Easter term: on the 13th Nov. 1818, a creditors' suit was instituted; the money was not all paid at the periods fixed; and a decree for administra-

(o) *Parton v. Douglas*, 8 Ves. 520;
Gulpin v. Lady Southampton, 18 Ves.
 469.

(p) *Anon.* 2 Sim. & Stu. 424; but
 see *contra*, *Jones v. Jones*, 5 Sim. 678.

(q) *Lee v. Park*, 1 Keen, 714.

(r) 3 Swans. 529.

tion being made on the 19th of Nov. 1818, notice thereof was given to the plaintiff at law, and an injunction was obtained to restrain all further proceedings. After this the sheriff took the intestate's goods in the hands of the administratrix in execution. And thereupon Sir J. Leach, V.C. made an order upon the sheriff to deliver up the goods of the intestate, providing by such order that if there should be a deficiency of the estate of the intestate to pay in full to the bond creditors who had brought the action, the debts due to them upon the administration of the estate, they should be at liberty to proceed against the administratrix at law, as if the sheriff had returned *nulla bona præter* the sum received by such bond creditors upon the administration of assets. A motion being made to discharge this order before the Lord Chancellor, he intimated that a course somewhat different from that adopted by it must be taken, but made no order. His Lordship expressed himself however in such a manner as to leave it to be inferred, that he would hesitate considerably, before he should hold that where the creditor has obtained a judgment at law before any decree in a creditors' suit, equity would restrain him from having the benefit of that judgment.

In *Lee v. Park*, Lord Langdale, M.R. after commenting upon *Drewry v. Thacker*, held that it is not of course that where the judgment at law is to recover *de bonis testatoris*, the executors are entitled to restrain execution, without reference to whether the judgment or the decree has priority. And his Lordship, adverting to a dictum of Lord Eldon in *Clarke v. Lord Ormonde* (s), said, that that was not the ordinary rule, and in the case before him he refused, upon a review of all the circumstances, to deprive the creditors, who had obtained judgment at law before the decree, of the benefit of their judgment. A case of *Goate v. Fryer* (t)

(s) In that case Lord Eldon said, that even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must

not take out execution.

(t) 3 Brown, C. C. 23; see the same case in 2 Cox, 201.

appears to have been relied on in *Lee v. Park*, in support of the proposition, that it is immaterial whether the decree or the judgment has priority in point of time. But in that case, as reported in Brawn, the point did not arise; the question not being, what would be the effect of priority in the judgment over the decree, but what would be the effect on costs, of the action having been brought before the bill was filed. The case was this:—An action was brought against Goate as the administratrix of her husband, and a suit was afterwards instituted for an account. To the action she pleaded *plene administravit*, and filed her bill for an injunction. A decree for an account was made in the suit the same day that the defendant at law pleaded her plea. And the question was whether the common injunction, having been obtained in the injunction suit, should be extended to stay trial, or should remain, having only the effect of staying execution; and the Lord Chancellor held that it should be extended to stay trial.—But he said that as the *action was commenced before the bill filed*, the creditor, if he chose to come in under the decree, and relinquish his action, might prove his costs at law in addition to his debt.

In *Martin v. Martin* (u), Lord Hardwicke said, “during the course of these two causes, (viz. a creditors’ suit, and an action by a creditor at law), the executor cannot bring a bill for an injunction, as the Court cannot tell *which will obtain judgment first*; for if the creditor suing at law does, he must be first satisfied, as he will then gain a preference in course of administration, both in law and equity; but if the decree be obtained first, then the Court will restrain.” And it seems that in that case an injunction during the course of the two causes, having been obtained by the heir-at-law before the decree, had been actually dissolved on that principle (x).

IV. The second point is, the effect on the jurisdiction of the

(u) 1 Ves. sen. p. 211.

(x) See the observations of the Lord Chancellor, *ibid.* 212.

nature of the suit in equity. On this point a distinction is to be noticed where the suit is by some creditors on behalf of themselves and all others who may come in, so that the decree is for the benefit of all; and where it is by creditors or other claimants on their own behalf merely, so that the decree is merely for the personal demand of the plaintiff. In the former case, the Court will not permit a creditor to proceed at law after the first or usual decree *for an account*, because the creditors under that decree prove their own debts, and the decree may be considered a judgment for that. But in the second case, a mere decree for an account of the demand of the plaintiff will not do, but there must be a report and a final decree upon it (*y*); and it follows, that in a suit of the first kind an executor will not be allowed payments made to particular creditors after the decree for an account; but he will be allowed such payments in a suit of the second kind until final decree (*z*).

V. On the third point, viz., the effect on the jurisdiction of the particular nature of the judgment obtained at law, a distinction has been taken in equity in several cases, which demands a somewhat minute examination, both because its soundness has been questioned in a work of great merit and reputation (*a*), and because undoubtedly the cases are not without some degree of vagueness and perhaps inaccuracy.

The distinction to which I refer has been made between the cases where the judgment at law is *de bonis testatoris*, and those where it is *de bonis testatoris, et si non de propriis*. In *Terrewest v. Featherby* (*b*), which was a suit instituted by the plaintiff on behalf of herself and all other creditors, it appeared that an action had been brought pending the suit, by a bond creditor of the testator, against the defendant Featherby, the executor, to which he pleaded *non est factum*, and *plenè administravit*. Upon both pleas issue

(*y*) Vide *Perry v. Phelps*, 10 Ves. 34; and *Jones v. Jukes*, 2 Ves. 518.

(*a*) *Williams' Law of Executors*.

(*b*) 2 Mer. 480.

(*z*) *Ibid*.

was joined, and a verdict entered for the plaintiff at law. A decree for an account having been obtained, the executor moved for an injunction to restrain execution; and for the creditor it was urged, that the executor's plea of *non est factum* and *plene administravit* being failed, the creditor was entitled to a judgment *de bonis testatoris et in rem de propriis*, and that therefore the Court ought not to interfere. Lord Eldon said, "the Court has never interfered in the manner sought for upon a judgment *de bonis propriis*. Is the creditor who has obtained such a judgment to come in *pari passu* with the rest of the creditors? His judgment would be of no service to him if he were delayed by a suit here, until it could be ascertained whether there are assets of the testator to answer his demands, which might not be until after all chance of recovering against the executor *de bonis propriis* is entirely gone." The injunction was not granted.

In *Brook v. Skinner* (c), the same learned judge said, "that if the plaintiff at law recovered judgment *de bonis testatoris*, the Court would not suffer execution to be taken out on such judgment; but that if he recovered *de bonis propriis* the Court could not restrain execution." In that case, an injunction had been granted to restrain an action in which the executor had pleaded *plene administravit, ultra* sufficient to pay certain specified debts of a higher nature. The order was discharged, the Court assuming, it seems, that where the executor so pleaded, and the plaintiff falsified his plea, the judgment would be *de bonis propriis*.

In *Dyer v. Kearsley* (d), after the usual decree obtained by the plaintiff against an executor in a creditors' suit, another creditor brought an action. The executor obtained time to plead, and, after the decree, suffered judgment to go by default. The Court granted an injunction, saying, "the executor's suffering judgment to go by default, was no more than his saying he was ready to do whatever a Court of law or equity might think proper."

(c) 2 Mer. 401, n.

(d) 2 Mer. 402, n.

In a subsequent case before Lord Eldon (*e*), the judgment at law was against the assets for damages, and against the goods of the executor for *costs* only (*f*). The injunction was granted ; but his Lordship directed the defendant, the executor, to pay to the plaintiff at law his costs at law, including the costs of the trial. Although, therefore, the creditor was restrained from proceeding against the assets, he was, in effect, put in the same position as if he had been allowed to proceed, and had recovered against the executor personally for his costs.

In *Fielden v. Fielden* (*g*), it became unnecessary to consider the point, the Court being of opinion that the executors had given instructions to their solicitor to plead to the action, merely for the purpose of giving them time to apply for the assistance of equity, and that the plea of *plenè administravit* was a mere form, adopted by the solicitor without communication with his clients. And on these grounds the case was held to fall within the reason of the decision in *Dyer v. Kearsley*, and the executors entitled to the protection of the Court.

In *Clarke v. Earl of Ormonde* (*h*), Lord Eldon said, “there are, I understand, two creditors here—one for goods sold and delivered, and another for funeral expenses. If they have obtained judgments, by which the executors are personally liable *de bonis propriis*, I have nothing to do with it ; but if they are judgments *de bonis testatoris*, it would be a case for an injunction.” Two late cases, decided by Sir L. Shadwell, V. C., appear now to have settled the rule in equity upon a clear basis ; I allude to *Price v. Evans* (*i*), and *Kent v. Pickering* (*k*). In the former of these cases, the action was brought by a bond creditor of the intestate against his daughters and co-heirs, who pleaded *riens per descent*, and the verdict was for the

(*e*) *Lord v. Wormleighton*, Jac. 148.

(*g*) 1 Sim. & Stuart, 255.

(*f*) This it seems is the regular judgment at law, except where the executor pleads a release to himself, or *ne unque executor*, see *post*, 120.

(*h*) 1 Jac. 108, and see p. 124.

(*i*) 4 Sim. 514.

(*k*) 5 Sim. 569.

plaintiff, who had therefore, under the 3d W. & M. c. 14, a personal remedy against the daughters as co-heirs of the intestate; but before the action was tried, the usual decree had been obtained in Chancery in a creditor's suit, and the motion before his Honor the Vice-Chancellor was to restrain the creditor from further proceedings at law. The Court said, "if the co-heirs are liable at law they must remain so; but I see no objection to my making an order protecting the assets." And it was ordered, that the creditor who had brought the action should be restrained by injunction from taking out execution against the assets of the intestate; the costs of the application to be paid by the defendants, the co-heirs and administrators. In *Kent v. Pickering*, the action was against the executors by a bond creditor, who had recovered judgment (according to the report) *de bonis testatoris et si non de propriis*. On the motion after decree for an injunction to restrain execution, *Terrewest v. Featherby*, and *Brooks v. Skinner* were urged as authorities that the injunction should not go; but his Honor thus laid down the rule:—"Where there is a decree for the administration of the assets of a testator, the Court will interfere, so far as may be necessary to give effect to its own decree; but it will not interfere to protect the executors from any liability to which they may have subjected themselves personally." The injunction was granted to restrain the creditor from proceeding at law against the assets of the testator only; and the same doctrine was stated and acted upon by the same learned judge in a still later case (*l*).

In *Lee v. Park(m)*, already mentioned, the point now under discussion was much argued, but the decision was put on other grounds. The case was, judgment obtained by a bond creditor against executors, who first pleaded *non est factum*, and then being advised they had no defence to the action, withdrew their plea, and suffered judgment to go by default. Judgment was entered up on the 5th of August, 1835, for the

(l) *Burles v. Popplewell*, 4 Jur. 244.

(m) 1 Keen, 714.

debt and costs, to be levied *de bonis testatoris et si non*, then *de bonis propriis* as to costs. On the 5th of December, 1835, the plaintiffs at law issued a writ of *fiery facias de bonis testatoris* on the judgment, but the writ remained unexecuted, there being no goods of the testator. In January, 1836, the usual decree for an account of the testator's estate was obtained in a creditor's suit instituted in 1832; and in December, 1836, a motion was made by the executors for an injunction to restrain execution upon the judgment obtained in August, 1835. The answers gave an unsatisfactory account as to the state of the assets; the original answer denying assets beyond such small sums as might from time to time have remained in the executors' hands until the application thereof, and alleging that the executors were unable to set forth the amount; while the schedule to their further answer showed an apparent balance of more than 900*l*.

It was argued for the creditor, that the judgment was substantially a judgment against the goods of the executor, although, in point of form, satisfaction was to be first had out of the goods of the testator. Lord Langdale, M. R., in giving his judgment, said, "it has been argued, that in cases of this nature, the Court pays no regard to the question whether the decree or judgment has priority in time, but considers only the quality of the judgment; and that the judgment in this case being a judgment to recover *de bonis testatoris*, the executors are, as of course, entitled to restrain the judgment creditors from issuing execution. *I do not accede to that argument (n).*" And after reviewing the cases, his Lordship concluded his judgment thus: "in the subsequent case of *Clarke v. Lord Ormonde*, in which the point was not raised, Lord Eldon is reported to have said, that even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must not take out execution; and in reference to the conduct of the parties, and perhaps to the nature of the claim, there may be such cases; *but such is not the ordinary rule*, and

(n) 1 Keen, 719.

in this particular case, having regard on the one hand to the nature of the suit in equity, the time when the bill was filed, the statement as to the assets in the answer, the time when the decree was obtained, and the absence of any explanation of the state of the assets at this time; and having regard on the other hand to the time when the action was brought and the judgment obtained, the rights which the bond creditors have obtained of having satisfaction out of the assets of the testator if the sheriff finds them, or if not upon the sheriff's return, to bring an action, which will entitle them to satisfaction out of the goods of the executor; considering also that if there should be a deficiency of assets, the claimants therein would, if they suffered, suffer because they used less diligence than the plaintiffs at law, but would not suffer at all if the executors were held to have a right to stand against the assets only, in the situation in which the creditors would have stood upon a just administration, I think that this motion ought to be refused with costs (*o*)."

It appears, therefore, that Lord Langdale's judgment in *Lee v. Park* was based on the consideration that, having regard to *all the circumstances*, he would not disturb the effect of a judgment at law, prior in point of time to the decree in equity. And in this view of the case it became unnecessary to consider, and his lordship gave in fact no judicial opinion on the point, whether the *form* of the judgment at law would affect the decision of the Court.

These are all the cases of which I am aware, bearing on the distinction in question.

VI. Mr. Williams, in his learned and excellent work on the Law of Executors, observes, in reference to the distinction taken in *Brook v. Skinner*, and several of the subsequent cases, that some of the distinctions and observations appear to have been made without a perfectly clear apprehension of the nature and consequence of judgments

at law against executors and administrators (*p*); and after stating the nature and effect of the judgments entered up on the different kinds of pleas pleadable by an executor, the learned writer concludes on that part of the subject thus: "Hence it should seem to follow, that if the principle is, that a Court of equity will not by injunction exclude creditors proceeding at law, from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative, that principle would apply to every case where a creditor has obtained a judgment at law of any kind, other than a judgment of assets *quando acciderint* (except cases such as *Dyer v. Kearsley* and *Fielden v. Fielden*, where the executor has taken steps merely with a view to gain time to apply to a Court of equity) because by the judgment in every case the creditor has established a right to proceed against the goods of the representative, in the event of a deficiency of the goods of the deceased." With great respect for the learned writer to whose observations I have referred, I submit that they are not warranted by the cases in equity to which they are applied, and that although in some of the cases in which the distinction in question has been taken, the Court appears undoubtedly to have been under a misapprehension as to the form of the judgment obtained or obtainable at law in the particular cases, yet the language of the Court affords no proof that it was unaware of the effect of the particular kind of judgment with which it *supposed itself* to be dealing; and further, that the distinction taken in *Brook v. Skinner* and the other cases, is perfectly consistent with, and may well be presumed to have been taken, with reference to the difference between the effect of a judgment primarily *de bonis testatoris*, and a judgment primarily *de bonis testatoris et si non de propriis*. The difference between the two kinds of judgment

appears material. Under a judgment of the first kind, the creditor, although he in fact has a remedy against the goods of the executor, has it, strictly speaking, not under the *original judgment*, but under a distinct judgment obtained in a subsequent action brought personally against the executor, and grounded on assumed facts, of which the original judgment against the goods of the testator and the return of the sheriff are *evidence*(*q*). While with regard to the second kind of judgment, the execution against the goods of the executor would be founded *directly on the original judgment* against him(*r*).

Now with respect to the two cases of *Brook v. Skinner* and *Terrewest v. Featherby*, it seems it is true that the circumstances must have been to a certain extent inaccurately stated to the Court; for it appears clear that at law there can in no case be a judgment *de bonis testatoris et si non de propriis* upon a plea of *non est factum* or *plene administravit*; but that the course is in such a case that the plaintiff recovers the debt and costs to be levied out of the *assets of the testator*, if the defendant have so much, but if not, then the *costs* out of the defendant's *own goods*(*s*). But it appears also perfectly clear from the reports of those cases, that the Court thought the judgment, in respect of which the application was made, was or would be judgment primarily *de bonis testatoris et si non de propriis*; and from the expressions used by Lord Eldon in *Terrewest v. Featherby*, it seems probable that his Lordship thought that he could not grant the injunction without suspending the right of the creditor against the goods of the executor as well as against the goods of the testator. That his Lordship refused the injunction on that ground; and that if it had occurred to him as practicable, to divide the relief in the manner subsequently done by the Vice-Chancellor, he

(*q*) See *Williams Exor.* Part V. Book 2, Chap. 1, and in particular pp. 1498 *et seq.*, and 1416 *et seq.*

(*r*) *Williams Exor.* 1367.

(*s*) 1 *Saund.* 335, n. 10 to *Hancock v. Proud*, and see *Will. Exors.* 1366 and 1409.

would have done so, appears the more probable from his order in *Lord v. Wormleighton*, which, while it restrained execution against the *assets of the testator*, gave to the creditor, in respect of the *costs*, the full benefit of his judgment at law against the goods of the executor. The principle, therefore, which, I submit, is to be collected from the cases now under discussion, is not, as Mr. Williams appears to consider it, that the Court will refuse to interfere wherever the creditor has obtained a judgment which by itself, or by its consequences, would give him at law a right against the goods of the executor; but merely that the Court will refuse to relieve against the personal liability of the executor; and that, therefore, if the judgment immediately, and by its own intrinsic operation, affects both the goods of the testator and the goods of the executor, the Court will restrain only so far as it appears to it practicable to separate the liability of the testator's assets, from the direct personal liability of the executor. This principle, I submit, is the true result of the cases in equity; and if it be so, then the consequence which Mr. Williams appears to attribute to the decisions in question, viz. that equity, to be consistent, ought to refuse to restrain wherever the creditor has obtained a judgment of any kind, other than a judgment of assets *quando acciderint*, does not seem to follow.

VII. On the whole, the authorities seem to warrant, in reference to the three points lastly considered, the following propositions :

I. That when the decree in equity is prior in point of time to the judgment at law, an injunction of some extent will be granted. But that where the decree in equity is posterior in point of time to the judgment at law, the Court, although it has jurisdiction to grant an injunction, will require a special state of circumstances to induce it to exercise that jurisdiction.

II. That if the suit in equity is so framed, that the judgment is for the benefit of all the creditors, the Court will

grant an injunction after a mere *decree for an account*. But that if the suit is so framed, that the decree affects the individual claim of the plaintiff only, there must be a *final decree* before an injunction will be granted.

And III. That where the decree in equity being prior in point of time, the judgment at law is *de bonis testatoris*, and as to costs merely *de bonis propriis*, equity will either restrain the proceedings at law entirely, providing by its own order for payment to the creditor of the costs at law; or will restrain the proceedings specifically against the assets only, leaving the creditor to obtain the costs under his judgment at law. And that if the judgment at law is *de bonis testatoris et si non de propriis*, the injunction will now be granted to restrain proceedings against the assets only, without prejudice to such rights at law against the representative personally, as the creditor may have.

8. In *Bank of England v. Lunn* (t) Lord Eldon refused to restrain executors from bringing an action against the bank for refusing to permit the transfer of stock, specifically bequeathed, into the executor's name, on the ground, it seems, of want of jurisdiction. For his Lordship finally stated the ground of his decision thus—"If the executor cannot maintain an action at law, the plaintiffs do not want the protection of this Court. If he can maintain an action, then the true construction of the act of parliament (u) authorizes, and does not prevent that action. And if so, there is no equity."

And it has since been determined that, though there be a specific bequest of stock, the bank has no right to refuse to permit the executor to transfer it, unless it be shown that he has assented to the legacy. And if it does refuse, on a bill filed by the executor to compel it to permit the transfer, it will be decreed to do so with costs (x).

(t) 15 Ves. 569.

(u) 1 Geo. 1, stat. 2, c. 19, ss. 11 and 12.

(x) *Franklin v. Bank of England*, 1 Russ. 575. In a note to this report,

published in 1827, it is stated that an appeal against this decision was then pending. I have found no mention of the case in the Reports of Proceedings in the House of Lords.

9. It appears by a case in Vernon that before the statute 9 & 10 Will. 3, c. 15, where an agreement to refer matters in dispute to arbitration had been made a rule of a Court of law, that was not a ground of objection to the Court of Chancery entertaining jurisdiction over the award to relieve against it (*y*). And since that statute, where the agreement to refer is made a rule of a Court of law in an action depending in such Court, the Court of Chancery still entertains jurisdiction over the award (*z*), because such an award is not an award to which the statute applies. But where a reference is made under the statute, that is, of matters out of Court; and the submission has been made a rule of a Court of law under the statute; equity has no jurisdiction to restrain by injunction proceedings taken to enforce the award in the Court of law; for the language of the statute ousts the jurisdiction of every Court except the Court in which the submission has been made a rule (*a*). It is usual in the references to arbitration in use in Courts of law, to include a clause that neither of the parties shall institute any suit in equity against the arbitrators or against each other (*b*). The effect of this clause on the jurisdiction of equity to interfere in a reference made a rule of a Court of law in a cause depending and therefore not under the statute, seems still to be undetermined (*c*). However, if in disobedience to the express terms of an order of reference, a party file a bill in equity, a Court of law will grant an attachment against such party and his legal advisers for a contempt of Court (*d*).

Whether the jurisdiction of Chancery is prohibited by the statute, where a bill has been filed before the submission is actually made a rule of a Court of law, seems to have been formerly a matter of doubt. In an old case (*e*)

(*y*) *Brown v. Brown*, 1 Vern. 157.

(*z*) *Lord Lonsdale v. Littledale*, 2 Ves. 451.

(*a*) *Nicholls v. Chalie*, 14 Ves. 265; *Guinett v. Bannister*, *ibid.* 530; *Nicholls v. Roe*, 3 My. & Keen, 431.

(*b*) *Watson on Arbitration*, 318.

(*c*) 14 Ves. 268; 3 Myl. & K. 438.

(*d*) *Watson on Arbitration*, 318.

(*e*) *Ward v. Periam*, 2 Eq. Cas. Abr. 91.

a submission had been made a rule of the Court of King's Bench under the statute, and at the same time another rule was obtained for the defendant to show cause why an award then lately made should not be set aside. At the hearing of the second rule the judges disagreed as to setting aside the award, and consequently discharged the former rule, and no further rule was obtained. On this state of circumstances, the Lord Chancellor exercised jurisdiction by setting aside the award. In *Steff v. Andrews* (*f*), the Vice-Chancellor observed as to the jurisdiction "a mere submission to make an award a rule of Court is unimportant, unless it was actually made a rule of Court; if made a rule of Court, this Court could not act; the jurisdiction would be transferred to the Court in which the submission was made a rule; but if the submission is not acted upon, no other Court acquires jurisdiction." But in a case before Sir John Leach the precise point arose and was decided by him against the jurisdiction. "The statute," said the learned judge, "limits no time within which the party who seeks to enforce the award is to make his application to the Court for that purpose, but the party who seeks to set aside the award is to make his application to the Court before the last day of the next term after the award is made. The Court, however, has no jurisdiction either to enforce the award or to set it aside, until the submission be actually made a rule of the Court. Either party may make the submission a rule of the Court, and may obtain the aid of the Court either to enforce or avoid the award by taking in due time that preliminary step. The argument for the plaintiff admits that, if he had taken that preliminary step in due time this Court would have had no jurisdiction. But it is contended for him, that, because he failed to take that step, not only is the jurisdiction transferred to this Court, but he is relieved from all limitation as to the time within which he is to make his complaint against the award. I

(*f*) 2 Mad. 6.

can not consider that it was the intention of the legislature to leave it to a party who meant to complain of the award, to escape at his pleasure from the provisions of the statute. I consider it to be the duty of a party who means to complain of the award, to make the submission a rule, so as to give the proper Court jurisdiction; and that, if he fail to do this in due time, he cannot, by his own default, create a new jurisdiction in this Court, and defeat the limitation of time fixed by the statute."

This decision was disapproved by Sir L. Shadwell, V. C., who decided against it in *Nicholls v. Roe(g)*, but his Honor's decision was overruled upon appeal by Lord Brougham, C. His Lordship, after mentioning the cases of *Nichols v. Chalie* and *Gwinett v. Bannister*, in reference to the general question of jurisdiction, said, in allusion to *Gwinett v. Bannister*, "It was a case precisely the same with the present in every particular, save one,—that here the bill was filed before the submission was made a rule of Court, and in that case, the bill was filed after the submission was made a rule of Court; but I do not think that this makes any material difference. In — v. *Mills(h)*, a similar distinction was taken, but Lord Eldon disposed of the application on another ground, and said nothing of this. But surely the mere filing of a bill cannot be held to destroy the force of the statutory provision, more especially as the party filing the bill might at any moment have applied to the Court of King's Bench."

"It may be further observed, that the mere filing a bill is no interposition of the Court, and cannot be struck at by the prohibition of the statute. The order of the Court for an injunction, or a decree setting the award aside, would be within that prohibition; and it seems difficult to understand how the having done a thing not precluded by the statute, before the submission is made a rule of Court, can authorize the doing a thing after that step has been taken, which

thing is directly struck at by the statute in the most formal and express words (*h*)."

It may therefore now be considered settled, that where the submission either actually has been or may be made a rule of a Court of law, equity has no jurisdiction to restrain proceedings upon the award in any Court in which such submission is or may under the agreement be made a rule (*i*).

10. Where a party, in consequence of being levied upon by the crown as surety for another, has a legal right under the provisions of an act of parliament to proceed against that other party by extent to recover what he has paid, but equitable circumstances make it questionable whether the surety is in equity entitled to be so repaid, it seems doubtful whether an injunction ought to be granted to restrain him from so proceeding by extent. But at any rate, it should only be on immediate payment of the money into Court. And where such an injunction had been granted, with a month's time to pay the money into a banking house in the names of the plaintiff and defendant, Lord Chancellor, on an affidavit of the defendant's belief that the plaintiff in that month would go abroad with the money, ordered the injunction to be dismissed, unless the money was paid in to the banking house within three days from the date of the order (*j*).

Equity has no jurisdiction to restrain an action on a bond given by the father of an apprentice to his master, on the ground of misuser of the apprentice, because it is a matter which by the statute of 5 Eliz. c. 4, s. 35, belongs to the justices of the peace, and the only question is whether the misuser is a discharge of the apprentice, and that is a mere matter of law (*k*).

(*h*) 3 Myl. & K. 441, 442.

(*i*) *Whitehouse v. Partridge*, 3

(*i*) See also on this Watson on

Swans. 305.

Arbitration, c. 13, s. 2.

(*l*) *Argles v. Heaseman*, 1 Atk. 518.

11. Under this division of the subject fall to be considered the cases in which the Court will restrain proceedings in a Court of law against the acts of its officers.

That a power should be vested in any Court to prevent an inquiry by any tribunal except itself, into a wrong committed under its orders, or by its officers, may appear to many an anomaly in the organization of justice in a free state. But however this may be, it is well settled upon authority, that where the process of the Court of Chancery has been either issued irregularly, or, being regularly issued, has been irregularly executed, the Court has jurisdiction to restrain the party, who has been taken under such process, from bringing an action at law against the person executing it, and to draw to itself the consideration of the case; and will refer it to the Master to consider what will be a reasonable satisfaction to the party suffering (*l*). In *Aston v. Heron*, the principle on which the Court of Chancery proceeds in respect of this branch of its jurisdiction was elaborately discussed by Lord Chancellor Brougham. His Lordship admitted, on the authority of *Baily v. Devereux*, *Frowd v. Lawrence* and *May v. Hook*, that the Court has undoubted jurisdiction to exclude all other jurisdiction in every thing relating to its process; not only preventing any Court from judging whether or not its orders are regular, but from examining into the regularity of their execution; and not only preventing such examination, but shutting out redress at any hands but its own, where a wrongful act is admitted to

(*l*) *Frowd v. Lawrence*, 1 Jac. & W. 655; *Bailey v. Devereux*, 1 Vern. 269, and 1 Jac. & W. 660; *May v. Hook*, referred to in Dic. 619; and see 1 Jac. & W. 663; *Batchelor v. Blake*, 1 Hog. 98. *Frowd v. Lawrence* was a case of an attachment irregularly issued, which had been set aside with costs, and afterwards the defendant commenced an action against

the plaintiff and the sheriff for false imprisonment, and another against the plaintiff for maliciously suing out the attachment; Lord Eldon, on the authority of the two preceding cases, granted an injunction restraining the proceedings at law, and observed that though the jurisdiction was very strong, he was not at liberty to give it up.

have been done under colour of obeying its commands. But his Lordship laid down the following distinction: that where the *title of the officer of the Court* is questioned, the Court has no choice, and cannot give up the jurisdiction; but where *the process has been irregularly used*, there it is a matter of discretion with the Court whether it will draw to itself the examination of the matter, or leave it to other tribunals, and it is not bound to exclude concurrent jurisdiction. And he said the Court would require a case to be made against the officer of the Court, to induce it to leave the matter to be examined elsewhere. On these principles the order in *Aston v. Heron* (m) was grounded. The case was, a receiver had been appointed by the order of the Court, and levied a distress upon a tenant of the estate of which he was a receiver. The tenant brought an action of trespass against the receiver and bailiff; and on a bill to restrain these proceedings, Sir L. Shadwell, V. C., granted an injunction, and afterwards refused to dissolve it. A motion was then made before Lord Brougham to discharge the order of the Vice-Chancellor, refusing to dissolve the injunction. It did not appear by the affidavits what acts of the receiver were irregular, but they consisted merely of a vague and general declaration that he had put in the distress irregularly. On this state of circumstances Lord Brougham held that the Court should exercise its jurisdiction, and he accordingly refused the motion to dissolve the injunction with costs.

Again, in a case (n) where certain persons acting under a commission of rebellion regularly issued out of Chancery against A., entered the house of B., A.'s brother, who was not a party to the suit, and searched the house; upon which B. gave them in charge to the watch, and had them conveyed to the watchhouse, and there confined; it was held that this was a clear contempt, and that an order for committal made on an *ex parte* application was perfectly regular,

(m) 2 My. & Ke. 390.

(n) *Ex parte Clarke*, 1 Russ. & My. 563.

and that the party being no party to the suit made no difference. And in the same case *Brougham*, L. C., sustained an injunction to restrain B. from prosecuting an action against one of the commissioners for forcibly entering his house. Upon the affidavits it did not appear that there had been violence; nothing but a mere entry; and his Lordship held there was nothing in the case to induce him to depart from the principle decided by *May v. Hook* and *Frowd v. Lawrence*, that the Court has jurisdiction to draw to itself the consideration of whether or no a party has a just cause of complaint against its officers acting in the execution of their office. In *Philips v. Worth (o)*, the defendants, who had been imprisoned under an attachment, which was afterwards set aside by the Court for irregularity, were restrained from prosecuting actions at law. But the plaintiff in equity was ordered to pay the costs at law and of the application for an injunction, and it was referred to the Master to inquire and state what compensation the defendants were entitled to.

In a late case, however, where a party to a suit had been imprisoned under an attachment, which afterwards turned out to have been irregularly issued, the defendant, having brought an action without the leave of the Court, was ordered to pay the costs at law (*p*).

Lastly, in a very late case before Lord Langdale, M. R., the messenger of the Court had retained the custody of a defendant, who was in contempt, by remaining in his house beyond the period when in strictness he ought (under the 1 Will. 1, c. 36, rule 5,) to have brought him to the bar of the Court, or to have discharged him; the reason of his having thus acted irregularly was, that the defendant was very old and in bad health; and the officer refrained from removing him out of tenderness and consideration. Under these circumstances an injunction to restrain proceedings was granted with costs (*q*).

(*o*) 2 Russ. & My. 638.

(*q*) *Chalie v. Pickering*, 1 Keen,

(*p*) *Bricknell v. Rumford*, 1 Beav. 749.

12. These are, I believe, all the cases on this subject, and the learned reader will perceive that they establish, by an unbroken chain of decision, the doctrine, that where a wrong is done by an officer of the Court acting in the execution of its order, whether the wrong proceed from an irregularity in the order itself, or from irregularity in the mode of executing it by the officer, the Court possesses jurisdiction to restrain the parties from proceeding in any other Court to inquire into and remedy such wrong.

It has also been determined that an action against a sequestrator in possession will be restrained, as the Court will not allow its officer to be drawn into a litigation which it cannot control (*r*).

13. The Court also assumes jurisdiction in many cases over its own officers, as such, to restrain them from seeking redress in any other Court. Thus, if a solicitor, whose bill of costs has been taxed, and more than one-sixth taken off, brings an action against his client, before the costs of taxation are ascertained, for the amount of the bill taxed, the Court will restrain him from all further proceedings in the action until further order (*s*).

So if a person is employed as auctioneer or otherwise, in a sale directed by the Court, by the committees of a lunatic's estate, under the sanction of the Master, and has carried in his claim for his bill before the Master, he will not be allowed afterwards to proceed at law against the solicitor of the committees. For a claim arising in the course of an employment under a lunacy, and for the purpose of carrying into effect the decision of the Court in that lunacy, unless there is some special agreement to the contrary, is properly the subject of an inquiry before the Master (*t*).

And where commissioners for the examination of witnesses brought actions against the solicitor, for fees claimed

(*r*) *Hall v. Cunningham*, 5 Mad. 406.

(*s*) *Barr v. Huggins*, 4 Sim. 125.

(*t*) *Re Hester*, 2 My. & Cr. 441.

by them in respect of their business as commissioners, the Court said, the case was not distinguishable in principle from *Re Weaver*, and enjoined them, referring it to the Master to inquire, and state what was due to the commissioners for their fees (*u*).

When it is said that the Court has jurisdiction to restrain the person, *if such person be within its jurisdiction* (*x*), the rule must be understood to mean, not merely that the person shall be within the jurisdiction as to *locality*, but that he shall bear such a character as renders him personally amenable to the jurisdiction; therefore, where the person is not clothed with such a character that the Court has jurisdiction over that particular person in respect of his acts, and the act sought to be restrained can only be restrained by acting on the officers of another Court in derogation of the jurisdiction of that Court, equity will not interfere. This appears by the case of *Nicol v. Goodall* (*y*). In that case a suit had been instituted in the Court of Admiralty respecting the rights of certain owners of a privateer to a prize taken by such privateer; the Court decided that the captured vessel was not the property of the captain, but of the crown. The crown thereupon issued a warrant directing the registrar of the Court of Admiralty to pay part of the proceeds of the sale of the captured vessel to the agent of the privateer and to the captain, both of whom were part owners. Nothing, however, was paid under this warrant, owing to differences between the claimants, and to the bankruptcy of the agent; whereupon a second warrant was issued by the crown, to pay the money to the captain and another part owner. The assignees of the bankrupt then filed their bill, and moved for an injunction, among other things, to restrain the defendants, who filled the office of registrar of the Court of Admiralty, from paying the money. The Court held that the property was in the

(*u*) *Blundell v. Gladstone*, 9 Sim. 455.

(*x*) *Ante*, 96 and 101.

(*y*) 10 Ves. 155.

crown until the money was actually paid under the warrant, and said, "The first question is, in what stage is this Court upon the head of trust to interfere? Is the Court to interfere by restraining the regent from obeying the warrant, the king having the property? Is the Court to interfere in the Court of Admiralty, and to lock up the fund, or require it to be paid into this Court? They are not trustees until they have received it according to the king's order." The motion was refused with costs.

And it is also necessary that the parties making the application should have a sufficient interest. Thus, although an injunction would, it seems, be granted to restrain a receiver from raising rents, and from ejecting tenants, without application to the Master, if the application were made by a person having a sufficient interest; yet where there was a tenant for life subject to a trust term, remainder to the first and other sons of tenant for life in tail; with remainder for life, and remainders over in tail; a motion by the tenant for life in remainder and the tenants, to restrain the receiver from ejecting them, was refused with costs. The Court said, "Nobody interested in the estate has made any complaint; neither the tenant, nor the tenant for life have any thing to say to it. Upon what ground of interest of their's would they apply (z)?"

14. It seems very questionable whether the Court has jurisdiction to interfere without reference to property, to restrain persons from *petitioning* the legislature (a). But it is clear that it has no power to interfere, where the proceedings in parliament have gone so far as the reception of a bill by either House; for then the matter becomes the act of the House, not of the party; and the Court cannot then interfere, even though the bill should have been brought in in fraud of an undertaking given by the promoters of it to the Court. This was determined in the

(z) *Wynne v. Lord Newborough*, 1 Ves. 164.

(a) 1 Rail. Cas. 458.

case of *Attorney-General v. Manchester and Leeds Railway Company* (b). In that case the Court withheld an injunction to restrain the company from proceeding with certain works, pending the trial of the legal right, solely on the ground of their undertaking that the Court should, after the trial, have the same control over the works that it then had. Before the right was tried at law, the company, without notice to their opponents, petitioned for and obtained leave to bring in a bill, and a bill was brought into the House of Commons, containing a clause to prevent any Court of law or equity from compelling the company to take down or alter any of the works in question; and Lord Cottenham held that although this was a clear breach of the undertaking given to the Court, he could not in any manner interfere.

(b) 1 Rail. Cas. 436.

PART II.

OF INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

CHAPTER I.

Injunctions against Waste.

1. Waste by Tenant for Life generally.
2. At what Suit an Injunction against Waste may be obtained.
3. What Acts Tenant for Life not unimpeachable may do.
4. More concerning the Parties who may obtain Injunctions.
5. Where it is uncertain till Death of Tenant in Possession whether he has Title to the Timber.
6. Of the relative Rights of Tenant for Life and Remainder-men.
7. Injunctions against equitable Waste by Tenant without Impeachment.
8. Destruction will be restrained.
9. But not trifling Acts of Waste.
10. Doctrine as to restraining the cutting down of ornamental Timber.
11. Old Rule to stay cutting Timber actually ornamental.
12. Modern Rule that it must be planted or Growing for Ornament.
13. Principle which governs the Court on this Point.
14. Doubtful whether an Injunction can be granted against Waste generally, on Proof of particular Acts of Waste.
15. Injunction never granted on ground of its doing no Harm to Defendant.
16. Doctrine in case of Tenant for Life and Tenant in Fee, as to cutting down in a Husband (the Mortgage).
17. What is allowed to support an Injunction.
18. Tenant for Life, without Impeachment, not to be restrained, unless Trees are ought to be cut as Timber.
19. Waste by Jointen.
20. Waste by Tenant in Tail, under Act of Parliament, depriving of Power of Alienation.
21. *Burge v. Lamb.*
22. Waste by Tenant for Years.
23. Tenant for Years, with Power to commit Waste, restrainable as against prior Incumbencer.
24. Injunctions against breach of Covenant when secured by Penalty; and where it is a Contract for Compensation.
25. Of Injunctions in the Nature of Restraining Breach of Covenant, rather than against Waste.
26. Conversion of Pasture into Plough Land restrained &c.

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| <p>27. <i>Lathropp v. Marsh and Johnson v. Goldswaine, with Observations.</i></p> <p>28. <i>What constitutes ancient Pasture.</i></p> <p>29. <i>Attorney-General v. Foundling Hospital considered.</i></p> <p>30. <i>Leases for Lives, with Covenants for perpetual Renewal.</i></p> <p>31. <i>Observations on De Salis v. Crossan.</i></p> <p>32. <i>Waste in Houses.</i></p> <p>33. <i>Distinction between Things fixed and not fixed to the Freehold; and of Waste by Tenant holding over.</i></p> <p>34. <i>Waste by Tenant in Tail after Possibility.</i></p> <p>35. <i>Distinction where such Tenant has never been Tenant in Tail in Possession.</i></p> <p>36. <i>Will be restrained from committing malicious or destructive Waste.</i></p> <p>37. <i>Waste by Tenant in Dower and by the Curtesy.</i></p> <p>38. <i>Waste by Tenant in Common.</i></p> <p>39. <i>Waste by Mortgagor.</i></p> <p>40. <i>Constructive Trustee restrained from committing Waste.</i></p> <p>41. <i>Where Account will be granted without Injunction, and where not.</i></p> <p>42. <i>Injunctions at Suit of Copyholders and of Lords of Manors.</i></p> <p>43. <i>Injunctions against Ecclesiastical Corporations — What Waste a Parson may commit, and what not.</i></p> <p>44. <i>Ecclesiastical Corporations may</i></p> | <p><i>not cut Timber, except for Repairs.</i></p> <p>45. <i>Discussion of the Question, whether an Injunction will be granted against permissive Waste.</i></p> <p>46. <i>General Result of the Cases at Law on permissive Waste.</i></p> <p>47. <i>Injunctions to restrain Acts destructive of Property, analogous to Waste.</i></p> <p>48. <i>Of Restraining Interference with Assets of Testator or Intestate, pending Litigation in Ecclesiastical Court.</i></p> <p>49. <i>Other Cases of restraining Executors.</i></p> <p>50. <i>Injunctions to protect Receivers.</i></p> <p>51. <i>Injunctions between Partners.</i></p> <p>52. <i>Other Cases of Waste, or Acts in the Nature of Waste.</i></p> <p>53. <i>Injunctions to restrain Alienation of specific Chattel.</i></p> <p>54. <i>Injunctions to restrain Trespass; old Doctrine.</i></p> <p>55. <i>Early Distinction in Case of Mines.</i></p> <p>56. <i>Commencement of the modern Doctrine. Flamang's case.</i></p> <p>57. <i>Where Injunction granted to restrain Trespass, Plaintiff must not delay trying Right.</i></p> <p>58. <i>Not granted where no Destruction.</i></p> <p>59. <i>Old Rule remains as to mere Trespass.</i></p> <p>60. <i>Injunction not granted at suit of devisee against Heir, disputing Will.</i></p> <p>61. <i>Effect of standing by on Right to Injunction to stay Waste.</i></p> |
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GENERALLY all persons whose estates are less than estates of inheritance are impeachable of waste, unless they are made expressly unimpeachable, except in certain

excepted cases; as for instance, that of tenant in tail after possibility of issue extinct; and in Ireland, tenant for years under a lease renewable for ever.

1. A tenant for life, unless he take expressly without impeachment of waste, may not commit waste; as for instance, he may not cut timber or open new mines (*a*).

2. And although where there are two successive life estates with remainder or reversion in fee, an action of waste by the remainder man or reversioner does not lie at common law, because of the intermediate life estate, it appears that at a very early period equity would interfere by injunction at the suit of the remainder-man (*b*), or reversioner (*c*), or even at the suit of the second tenant for life; because, although he has no right to the timber, yet if the first tenant for life die, he has an interest in the mast and shade (*d*). And an injunction will be granted at the suit of a second tenant for life, even if there be no first tenant for life in esse, particularly as to ornamental timber, because it is granted, not so much in respect of his interest as of his enjoyment (*e*).

3. But although a tenant for life, not without impeachment, may not open new mines, he may continue working mines lawfully opened by the preceding tenant for life, and will not be restrained from opening new shafts

(*a*) *Cole v. Peyson*, 1 Rep. in Ch. 57; *Whitfield v. Beutt*, 2 P. Will. 240.

(*b*) See *Moor*, 554, No. 742; *Rowell's case*, 1 Rolle's Abrid. 377, plac. 13; and see *per* Lord Hardwicke in *Farrant v. Lovell*, 3 Atk. 723, *Robinson v. Litton*, 3 Atk. 210.

(*c*) *Whitfield v. Beutt*, 2 P. Will. 240.

(*d*) *Perrin v. Perrin*, 3 Atk. 94. The jurisdiction of equity to grant injunctions against waste is said to have taken its origin from the writ of prohibition of waste, *per* Lord Bathurst, C. in *Goulston v. Galatin*, Dick. 455.

(*e*) *Bridges v. Stephens*, 6 Mad. 279.

or pits to follow the same vein, and to admit air to the mine (*f*).

In a very late case (*g*), where there was devisee equitable tenant for life impeachable of waste, the inheritance consisted principally of old clay pits, which had been worked by a former proprietor; the devisor had never actually worked them, but was preparing at the date of his death to commence working; and the question was whether the tenant for life might work such pits; whether, in fact, she was taking the substance of the land, which it was admitted she might not do, or whether the devisor had by his act treated them as *profits* of the land. The case stood over, and an injunction, it is said, was ultimately granted.

4. An injunction has been also granted at the suit of the assignee of a lease, granted by one to whom the ground rent had been always paid, to stay waste in an under-lessee (*h*). In *Robinson v. Litton* (*i*), the devise was in effect to the devisor's son and his heirs until twenty-one, and after that to be sold, and the produce applied in augmentation of the fortunes of daughters of the devisor; and if the son should not reach twenty-one and should die without issue, then to the daughters. Lord Hardwicke granted an injunction at the suit of the daughters to restrain the son, being under twenty-one, from cutting timber. From the language of Lord Hardwicke it is to be collected, that he considered the estate as a legal fee in the son, in trust to receive the rents and profits himself till twenty-one, and thereafter in trust to be sold for the daughters. He says, "suppose the last clause had been the first, the defendant would have been clearly considered a trustee of the inheritance for the benefit of the

(*f*) *Clavering v. Clavering*, 2 332 and 362.

P. Wms. 389.

(*h*) *Farrant v. Lovel*, 3 Atk. 723.

(*g*) *Viner v. Vaughan*, 4 Jurist,

(*i*) 3 Atk. 209.

daughters; and that is the point I shall ground the injunction upon to stay waste (*h*).” The case is clearly distinguishable from that of a tenancy in fee, subject to be defeated on a contingency.

Where there is an estate for a term of years without impeachment of waste, except voluntary waste, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, remainder over in fee, the trustees to preserve may restrain the tenant for years by injunction from committing waste (*l*); and it seems not only that they may, but that it is their duty (*m*).

In *Stansfield v. Habergham*, the point arose whether an heir at law, taking a resulting trust estate until the happening of an event on which contingent estates would arise, was entitled to cut timber. Lord Eldon seems to have thought that he was not: his Lordship observed, that the doctrine of the Court was, that where there is an executory devise over even of a *legal* estate, equity will not permit the timber to be cut down; more especially not, if there is an executory devise of a trust estate. The point, however, did not call for express decision in that case, as the heir at law did not, in the view of the Court, take either at law or in equity an immediate estate of inheritance, in a sense that would entitle him to cut timber. For the legal freehold was in a trustee, with a direction to convey, after the failure of issue of a certain person who was then dead without issue inheritable, to the right heirs of the surviving trustee; and the Court said that it would have been a breach of trust in such trustee, not to have interposed an estate in some person to preserve the contingent remainders; and

(*k*) In the text of Atkyn, the last clause of the will is stated thus: “in case my son shall not attain twenty-one.” In the editor’s note it is stated from Reg. Lib. B. 1743. fol. 475, that the clause was “if the son should attain twenty-one.” It is clear from

the words used by the Lord Chancellor, that the latter must have been the actual limitation in the will.

(*l*) *Garth v. Cotton*, Dick. 183.

(*m*) *Per* Lord Eldon in *Stansfield v. Habergham*, 10 Ves. 202.

then, as in *Garth v. Cotton*, the person in whom that estate was vested might, and it would be his duty to interfere to prevent waste. It appeared that no conveyance had been made; on which the Lord Chancellor said, the surviving trustee had the legal estate in him, and was better entitled to preserve the timber than trustees to preserve contingent remainders; and sustained the injunction (*n*).

But although it is the right and duty of trustees to preserve contingent remainders, to protect the interests of the parties entitled in remainder against acts of waste by the tenant in possession, that does not take away the right of the parties entitled to vested estates or interests in remainder to apply to the Court. In a very late case, already cited on another point (*o*), it was contended, that where there is a devise to trustees on trust for one for life, and after the death of tenant for life, on trust to sell and divide the produce between several; that one of the parties entitled to an undivided reversionary share of the produce of the land, cannot file a bill to restrain the tenant for life from committing waste, and that the bill ought to be filed by the trustees. But the Court said there was no doubt that the party so entitled, had a right to come into equity for protection, and was not bound to look to the trustee to make an application.

5. Where the tenant in possession holds under a title of that ambiguous character, that the Court cannot determine until his death whether his estate was such as to have entitled him to commit waste or not, the Court will not, properly speaking, either restrain or permit waste, but will make such an order as shall permit timber to be cut, keeping the absolute beneficial enjoyment of it suspended till the nature of the estate can be determined (*p*). The case

(*n*) *Stansfield v. Habergham*, 10 332.

Ves. 273.

(*p*) *Wright v. Atkyns*, 1 Turner &

(*o*) *Viner v. Vaughan*, 4 Jurist, Russ. 143.

of *Wright v. Atkins* was this:—the testator devised all his houses, &c. and all other his real estate to Charlotte Atkins and her heirs, in the fullest confidence that after her demise she would devise the same to testator's family; and charged the premises devised with payment of his debts. The question was, what interest Charlotte Atkins took in the real estate. It was held that she took in fee, but whether coupled with a trust to devise to a particular class, or whether a fee upon condition to devise, the Court did not decide; the inclination of Lord Eldon's mind appears however to have been, that the estate of Charlotte Atkins was a fee clothed with a trust (*q*). Under those circumstances it was held, that it could not be decided till Mrs. Atkins' death, whether she was entitled to the timber for her own benefit, or whether it would belong to other parties. By restraining her from cutting timber, the Court would be, in effect, deciding against her right; while by not interfering at all, it would be deciding against the right, if any, of other parties. Lord Eldon thought, therefore, that he ought to interfere to the extent which was requisite to preserve the property for whoever should appear to be entitled to it. The order ultimately made was, that the defendants (Mrs. Atkins and two other persons, to whom she had conveyed her estate on certain trusts,) should be at liberty to cut timber in a husband-like manner, as tenants in fee, giving the plaintiff an account of what was felled; and that the money to arise by the sale of the timber cut should be placed to the credit of the cause, with liberty to the defendants to apply for more enlarged powers of cutting timber; and to apply to have the money paid out to them on giving security; and the plaintiff to have liberty to attend and see that the timber was cut in conformity with the order.

6. With respect to the question, what are the respective

rights of tenant for life and remainder-man to the timber, where the tenant for life is not expressly dispunishable for waste, Lord Chancellor Talbot has stated the general doctrine in a case of *Bewick v. Whitfield*(*r*); in that case A. was tenant for life, remainder to B. in tail as to one moiety, remainder as to the other moiety to C. in tail, remainder over. There was timber on the estate greatly decaying, and B. filed a bill to have the decaying timber cut down, and the proceeds divided between himself and C. Lord Chancellor said, "The timber while standing is part of the inheritance, but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall on the Cavendish estate.

"2dly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose, and whatever damage is done to the tenant for life on the premises held by him for life, the same ought to be made good to him.

"3dly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house or for ornament, shall not be cut down. B. that is tenant in tail (and of age) of one moiety is to have a moiety of the clear money, subject to such deductions as aforesaid, the other moiety belonging to the infant must be put out for the benefit of the infant on government or real securities, to be approved of by the Master." But in a late case where there were first, second,

(*r*) 3 P. Will. 267.

and third tenants for life, and tenant in tail in remainder in existence, the first tenant for life being in possession, cut down timber. Upon a bill being filed by the third tenant for life, and the tenant in tail in remainder, it was referred to the Master to take an account of the timber so cut, and upon the Master finding that certain timber was cut down, but that part of it had been applied in repairs, and that an affidavit had been made to the effect that, with the exception of five oak trees applied in repairs, such timber only had been cut down as was necessary for the growth and improvement of the remainder. It was ordered that the produce of that part of the timber which had not been applied in repairs, after deducting the expenses of cutting it down, should be paid into Court; and the interest of such produce paid to the first tenant for life during his life, and after his decease the parties were to be at liberty to apply. The costs of the suit were ordered to be paid by the first tenant for life in the following way: the plaintiffs were to pay the defendant, the second tenant for life, her costs; and the defendant, the first tenant for life, was afterwards to pay to the plaintiffs their costs, together with the costs paid by them to the defendant, the second tenant for life (1).

7. The cases however of most frequent occurrence and of the greatest difficulty as regards injunctions against waste by tenant for life, are where he is without impeachment of waste. For although tenant for life without impeachment of waste may at law commit waste within certain limits, as for instance, may cut down trees and convert them to his own use, or open new mines (2) and will not be restrained by equity from doing such acts (3), yet he will be restrained by equity from committing destructive or malicious waste, such as destroying or ma-

(1) *Croft v. Chambers*, MS. R. 116, 25th July, 1803.

(2) Co. Lit. 220 a, and the note *.
(3) 1 Ves. sen. 266.

terially damaging buildings, and cutting down ornamental timber, or timber which serves for the shelter of the estate (*x*).

8. This doctrine was established by the case of *Vane v. Lord Barnard* (*y*), where Lord Barnard having on the marriage of his son settled Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, with remainders over; afterwards conceived some displeasure against his son, and collected 200 workmen together and stripped the castle of the iron, lead, doors, &c., to the value of 3000*l*. Lord Cowper, C., granted an injunction to restrain him from pulling down the castle, and also ordered that the castle should be repaired, and a commission to issue to ascertain what ought to be repaired, and a Master to see it done at the expense and charge of the defendant, Lord Barnard. And in this case it was said, that the like injunctions had been frequently granted, and that the clauses *without impeachment of waste* never were intended to allow the very destruction of the estate itself.

9. But in a case before Lord Hardwicke (*z*), where a son brought his bill against his father, who was tenant for life without impeachment of waste, for pulling up a deal floor, removing some young oaks, and converting meadow into plough land, and *vice versâ*, the bill was dismissed with costs. No injunction was, it seems, applied for, and the Court said, that it was not an immaterial circumstance that the floor was placed and the trees planted by the father himself. The point whether an injunction would have been granted if applied for on the filing of the bill, was not determined. According to the report, the bill did not allege that the trees removed were *planted for ornament*, and if they were not, that is an additional reason why the

(*x*) Co. Litt. 220 a, and n. 1 *,
and the cases there cited.

(*y*) 2 Vern. 738; Prec. Chan. 454.

(*z*) *Peirs v. Peirs*, 1 Ves. sen. 521.

tenant for life without impeachment should not have been restrained from cutting down; but if trees are *planted for ornament* the tenant for life will be restrained from cutting them down, even though he planted them himself (a).

10. It is now settled by many cases, some of which will be particularly considered, that no injunction will be granted to restrain tenant for life without impeachment of waste from cutting trees standing in lanes, avenues, or ridings in a park: not serving for shade or ornament, though they should not be planted trees, but growing naturally; or young saplings, and trees not fit to cut as timber (b); or from cutting underwood before it is of sufficient growth (c).

11. As to ornamental timber the doctrine seems formerly to have been, that equity would restrain tenant for life without impeachment, from cutting trees if they were ornamental, whether planted for ornament or not (d); this is clearly not the law of the Court at the present day (e).

12. For it is quite settled that the Court does not now protect timber merely because it is ornamental; to obtain an injunction, it must be shown that the timber is *planted or growing for ornament*, that is, planted or left growing with an intent to afford ornament. And an injunction would not be granted on an affidavit stating that trees "afford ornament," because the expression is equivocal whether they were *planted* for ornament, or whether the *effect* is ornament (f). If the timber is *planted* for ornament, it will be protected, whether it is or is not ornamental.

(a) See Jac. 71.

(b) *Packington v. Packington*, 3 Atk. 215; *Atton v. Atton*, 1 Ves. 264; *O'Brien v. O'Brien*, Amb. 107; *Marp. Downshire v. Sandys*, 6 Ves. 108; *Tannerill v. Ferris*, *ibid.* 419; *Dry v. Mery*, 16 Ves. 375 a.

(c) *Bridges v. Stephens*, 6 Mad.

279.

(d) *Southmore v. Bower*, 2 L. C. 88.

(e) *Per Lord Eldon*, 16 Ves. 184; *Coffin v. Coffin*, Jac. 70.

(f) *Marp. Downshire v. Sandys*, 6 Ves. 112.

13. The principle on which the Court has gone in respect to ornamental timber seems to be, that if the testator, or the author of the interest by deed, has gratified his own taste by *planting for ornament*, although he has adopted the species the most disgusting to the tenant in tail, and upon the competition between those parties the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them. And it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber, for the purpose of ornament, cannot safely be trusted to the Court (*g*). And in a late case Lord Eldon said, “the doctrine of the Court is extremely well settled. If the object in planting timber or in leaving timber standing is ornament, whether that object is effected, whether the effect is truly ornamental, or the most absurd exhibition that ever was produced, this Court will protect that timber (*h*).” On the same principle the Court will restrain tenant for life without impeachment of waste from cutting trees planted for the purpose of excluding objects from view (*i*). But the Court will not go further than the order in *Chamberlayne v. Dummer* (*k*), and in one case refused to include in an

(*g*) *M. Downshire v. Sandys*, 6 Ves. 107; see p. 110, *et seq.* It is difficult to conceive the species of evidence on which a Court of equity can ever be said *judicially* to ascertain that a particular act is right or wrong in point of taste.

(*h*) *Wombwell v. Belasyse*, 6 Ves. 110 a. n.

(*i*) *Day v. Merry*, 16 Ves. 375 a.

(*k*) In the case of *Chamberlayne v. Dummer*, 1 Br. C. C. 165, it was decided, that under a devise for life, containing a power to the tenant for life to cut timber for her own use and benefit at seasonable times in the year, the

tenant for life was not restricted to cut for her own use on the estate or for estovers only, but every thing which could be fairly called *timber*; though not such sticks as would only make paling. And the tenant for life was in that case restrained from committing equitable waste only, viz. from cutting trees growing on the estate which were planted or growing there for the protection or shelter of the mansion-house, or which grew in lines, walks, vistas, or otherwise for the ornament of the house, or of the gardens, or parks, or pleasure grounds thereunto belonging; and from cutting

order to restrain the cutting of ornamental timber, the words "which contribute to ornament (*l*)."

A tenant for life unimpeachable of waste will be restrained from cutting down trees ornamental to a mansion-house, park and pleasure grounds, although the settlement under which he claims contains an express power to pull down the mansion-house without rebuilding it, and although the mansion has, in pursuance of such power, been pulled down. For although the trees may be intended for the shelter and ornament of the mansion-house, it does not follow that they are exclusively for that purpose, and equity protects trees even if they are out of sight of the house (*m*). The latter proposition is in accordance with the earlier authorities (*n*). In the *Marquis of Downshire v. Sandys* the point was, whether a breach of the injunction had been committed by cutting down trees on a common, part of the settled property, two miles distant from the house. It was sworn that the trees were planted with order in clumps, for ornament to the common. On the other side it was sworn that the common was not in sight of the house. But Lord Eldon said, the remoteness or contiguity of the trees, if *de facto* they were planted for ornament, could not alter the principle, although it might be fit to be considered as evidence of intention, if the fact, *whether planted for ornament or not*, were under discussion. And it appears, by a case before Sir J. Leach, that the Court will adopt a liberal construction of the words of a testator or settlor in favour of the protection of the remainder-man. In the case referred to, estates were devised

down any timber or other trees, except in a husbandlike manner and at reasonable times, and from cutting down saplings and young trees not fit to be cut as and for the purpose of timber, until the hearing or further order, see 1 Br. C. C. 168, n. 3. The order in this case has been made the general model for the orders issued in the

ordinary case of tenant for life simply unimpeachable of waste.

(*l*) *Barlow v. Macnamara*, 8 Ves. 70.

(*m*) *Wellesley v. Wellesley*, 6 Sim. 197.

(*n*) *Marquis of Downshire v. Sandys*, and *Wombell v. Bellamy*, cited *ante*, p. 145.

to the defendant for life without impeachment of waste, except the timber *growing in* the park, avenues, demesne lands and woods *adjoining* the capital messuage. The tenant for life cut timber in woods adjoining *the park*, and in one about 290 yards distant from it: there were no woods strictly *adjoining* to the *capital messuage*. The Court held that the word “adjoining” must be construed to relate to woods so adjoining to the mansion-house, as to contribute to its comfort or pleasure; and granted an injunction (*p*).

14. In *Coffin v. Coffin* (*q*), Sir J. Leach, V. C., said, that as to waste *at law*, if any act of waste be established, the Court restrains not only the particular act, but all waste generally; and so in the case of equitable waste, if the complaint be established as to one act, the Court will restrain all equitable waste generally. In that case an objection was taken that the injunction was to restrain the cutting down of trees planted or left standing for ornament or shelter, and also *saplings and immature trees*, while the bill did not allege any waste as to saplings or immature trees; but the objection was overruled. On the case coming before Lord Eldon, his Lordship seems to have expressed a doubt of this doctrine (*r*).

15. It must be observed that the Court never grants injunctions on the principle that they will do no harm to the defendant, if he does not intend to commit the act in question. If there be no ground for the injunction, it will not be supported (*s*).

16. With regard to the obligation imposed on a tenant for life without impeachment to cut timber only in a husbandlike manner, it is to be observed that the Court

(*p*) *Newdigate v. Newdigate*, 1 Sim.
131.

(*r*) *Coffin v. Coffin*, Jac. 70.

(*s*) *Ibid.*

(*q*) *Mad. & Geld.* 17.

does not expect a tenant for life to let timber grow so long as a tenant in fee might find it his interest to do (6).

17. A small degree of waste by tenant for life, manifesting an intention to do more, or even a threat to commit waste, will be sufficient for the Court to act upon (7). Thus, in the case of *Coffin v. Coffin*, already referred to, where the assignee of tenant for life without impeachment gave notice of an intention to cut down trees ornamental to the main house, an injunction obtained upon such threat was supported to the extent of that species of waste to which the notice referred, but not further. But where the acts of waste were of very small extent, and most of them had been committed some years before the commencement of the suit, and it appeared that since the filing of the bill the defendant had ceased committing waste, a motion for an injunction was refused (8). The motion was afterwards renewed upon an allegation that the defendant had since committed further acts of waste. It appeared, however, that the value of the timber cut was exceedingly small; that part of it had been cut to preserve the other trees; that the cuttings had been employed in repairing fences; and that the property had not been put in any hazard. Under these circumstances the motion was again refused. The case appears to have been partly decided by analogy to the rule which prevailed at common law, that in an action for waste, where there has been a verdict for plaintiff, but the damage done is very small, judgment will be entered up for the defendant (9). It is to be observed also that, in refusing the first motion, Lord Eldon appears to have given some weight to the circumstances that the defendant was the father of the plaintiff, and had originally been tenant for life *without* impeachment of waste, but had

(6) Jac. 72.

(7) *Barry v. Barry*, *supra*.

(8) *Barry v. Barry*, 1 Jac. & W. 651; *Coffin v. Coffin*, Jac. 70; and see *Gibson v. Smith*, 2 Atk. 183.

(9) *Harrow School v. Abberton*, 2 Bos. & Pull. 86.

by settlement reduced himself to be impeachable of waste. The principal grounds, however, of the decision appears to have been the delay on the part of the remainder-man, and the trivial extent of the waste.

18. But although a tenant for life without impeachment of waste is in equity, as we have seen, restrained to a certain extent from committing waste, he is not bound to adhere to the rules as to cutting trees which a tenant in fee might observe, for the purpose of husbandlike cultivation. He will not be restrained, therefore, from cutting trees merely because they are thriving, or because cutting them down would injure the saplings; it must be shown that the trees are unfit to be cut *as timber*; for if they are so far advanced as to be timber, he may cut them in equity (z).

In a case where a tenant for life impeachable of waste, with power of appointment to her children, executed several deeds, making some appointments, and releasing her powers, the effect of which deeds was doubtful, so that the interests of the children were not clear; and they all agreed with the mother to suffer a recovery of the estate, and to declare the uses to her for life without impeachment of waste, with remainder to other uses; Lord Eldon thought on the whole that the arrangement might be supported, and that an injunction which had been granted to restrain the tenant for life from committing waste must fail. The order ultimately made was, that the plaintiff should give security for paying to the tenant for life the value of the timber which she might have cut, if at the hearing she should be held entitled, and in default of such hearing the injunction to be dissolved (a).

19. An injunction will be granted against a jointress as tenant for life, unless she is expressly made dispunishable of waste; and that although there be remainder for life

(z) *Smythe v. Smythe*, 2 Swans. 251.

(a) *Davis v. Uphill*, 1 Swans. 129.

after her life estate, remainder in tail, by reason of which *mere* life estate, she should not be punishable at law (*b*). But in an early case, a jointress, who had a covenant that her jointure should be of such a yearly value, which fell short, was not enjoined from committing waste to make up the defect of her jointure, although her estate was not expressly without impeachment of waste (*c*). Jointress in tail will not be restrained from cutting timber, because she hath the inheritance (*d*). In the case referred to, Lord Nottingham lays down the distinction on which a Court of equity interferes in some cases to restrain waste, and in others refuses; viz. that where the tenant has a bare indemnity or impunity, as if there be tenant for life, remainder for life, reversion in fee, there he will be restrained in equity. But if he have a right in the thing itself, when it is wasted and cut down, there it is no way reasonable that he should be restrained.

20. In the great case of *The Attorney-General v. Duke of Marlborough* (*e*), a question arose whether a tenant under an act of parliament, under such limitations as would in a deed have made him simply tenant in tail, but with a proviso restricting the power of alienation by fine, recovery, or any other conveyance, would be impeachable of waste, either legal or equitable; and Sir J. Leach, V.C., thought that the legislature must be intended to use words in their legal sense; that therefore the estate was primarily an estate tail, with all the incidents of an estate tail, and with them the uncontrolled power of committing waste; that the legislature, by imposing an express restriction upon one incident of the estate, by inference left all the other legal incidents subsisting; that the case standing thus upon principle, there was no precedent of the Court having exercised jurisdiction to restrain waste by a tenant in tail

(*b*) *Tresham v. Gerard*, Tothill, 400.
144; *Leach v. Bassett*, Finch, 189;

1 Vern. 23.

(*c*) *Carew v. Carew*, 1 Eq. Ca. Ab.

(*d*) *Skelton v. Skelton*, before Lord Nottingham, see 2 Swabs. 170, *notis*.

(*e*) 3 Mad. 498.

deprived of the power of barring his successor; and accordingly upon the acts brought before the Court on the first hearing of this case, the Court allowed a demurrer to a bill for an injunction. But afterwards it appeared that there was another act made in *pari materiâ*, and the Court was of opinion, that the intention of the legislature was to be collected by implication from the whole language of all the acts taken together. The act in question (5 Anne, c. 4) recited, that the house of Blenheim was erected at the Queen's expense, and proceeded to settle a pension on the Duke of Marlborough and his posterity, for the more honorable support of their dignities, in like manner as his honors and the honor and manor of Woodstock, and the house of Blenheim, were already limited and settled; Sir J. Leach thought that all the acts together afforded a clear and necessary implication, that it was the intention of the legislature that the house of Blenheim should in all times as a distinct subject descend and be enjoyed with the honors and dignity of the family; that the legislature imposed upon every possessor of those honors and dignities, the obligation to maintain the house of Blenheim for the future residence of those to whom the succession was limited; and that the Duke had no power of destruction over the house, or over timber essential to the shelter or ornament of the house.

21. In a case before Lord Eldon, there was a devise of real estate to tenant for life without impeachment of waste, remainder to trustees to preserve; remainder to the first and other sons of the tenant for life, in tail; remainder to a second tenant for life without impeachment of waste, remainder to trustees to preserve; remainder to a third tenant for life, and after several other intermediate limitations, remainder over in fee: and by the same will *personal* property was given to the first and second tenants for life, in trust to purchase lands, and to settle the same in the same manner as the devised lands; the trustees purchased lands

on which was a considerable quantity of timber, which the first tenant for life cut. The material question was, whether the personal estate bequeathed in trust was properly laid out by the trustees in an estate on which was a quantity of timber, and whether an injunction could be sustained against the first tenant for life cutting timber. The question Lord Eldon would not decide, the frame of the record not being such as to bring it properly before him (e). His Lordship appears, however, to have entertained some idea that if the value of the timber bore a great proportion to that of the whole estate, there must be something in the nature of an equitable partition between the successive tenants for life.

22. A tenant for years ought not in general to commit waste of any kind, and may be restrained by injunction at the suit of the remainder-man for life (f). But though it is waste in a tenant for years improperly to work mines, yet it was laid down in an early case that the Court will not, on account of the great inconvenience, stay working collieries, unless there is an express breach of covenant or uncontroverted mischief (g). A tenant for years is, however, frequently made expressly punishable for waste, and then although he will not be restrained from committing ordinary waste, equity will interfere as in the case of tenant for life without impeachment of waste, to prevent destructive or malicious waste. Thus in an old case where one was lessee for years *sans waste*, remainder in fee to a bishop, the lessee was restrained by the Court from digging the ground for bricks, as this was to ruin the inheritance (h).

23. And here we may observe that a tenant for years,

(e) *Burges v. Lamb*, 16 Ves. 174.

Ves. 281.

(f) *Roswell's case*, 1 Roll. Ab. 377.

(h) *Bishop of London v. Webb*, 1 P. Wms. 527.

(g) *Anon. Amb.* 209; see also 17

although expressly dispunishable of waste as between him and his lessor, may be liable to be restrained as between him and third parties. This point arose in *Turkington v. Kearnan*(i), on a lease containing a power of committing waste, granted of lands subject to a prior charge; and in a suit touching these lands, a decree was made, declaring the lease good *quoad* the power to commit waste, and at the same time sustaining an order to restrain waste, the incumbrancer being still unpaid. On a re-hearing, Lord Chancellor Sugden supported the decree on that point, on the ground that the lease and its power to commit waste might be good as between the lessor and lessee, and yet the lessee might be restrainable as between him and the incumbrancers, for any waste tending to diminish their security.

Where the covenant was that the tenant should not plough pasture land, but that if he did, then he should pay after the rate of 20s. an acre per annum, the Court refused to restrain him, treating this as a case of contract to do a certain act on given terms; and said if he, the defendant, had been plaintiff, having ploughed, and sought to restrain the lessor from requiring the 20s. an acre, the Court would not have enjoined the lessor (k). But in another case, where a lessee held under a covenant not to break up or dig, and that if any part of the premises should be "dug or broken up, for the using or taking away of brick earth, sand, or gravel, then the lessees should in every or in any such case pay to the lessors 100*l.* for every acre which should be so ploughed, dug up, or broken," &c. this was treated as a case of penalty, and the House of Lords held, against the opinion of Lord King, that the lessee ought to be restrained by injunction from digging or breaking up the ground till the hearing (l).

24. Stipulations against particular acts of waste are

(i) *Lloyd & Goold*, 35.

Br. P. C. 436.

(k) *Woodward v. Gyles*, 2 Vern.

(l) *City of London v. Pugh*, 4 Br.

119; see also *Rolfe v. Paterson*, 2

P. C. 395.

sometimes introduced in leases. When the stipulation is in the nature of a *penalty*, properly so called, equity will grant an injunction to restrain the lessee from doing the particular act which is the subject of the penalty. But where the agreement is such as to show that the intention of the parties is not properly to prevent the act by a penalty, but to agree on terms for doing it, an injunction will not be granted.

25. As between lessor and lessee, the cases on injunctions to restrain the tenant from committing waste, are, indeed, most frequently on actual or implied covenants; and the injunction is then more properly, both in form and substance, to restrain breach of covenant than against waste simply.

26. Thus where there is a covenant to manage pasture in a husbandlike manner, that is equivalent to a covenant not to convert plough land into pasture, and an injunction will be granted. In *Pulteney v. Shelton* (m), the tenant had greatly neglected his farm: after an ejectment brought against him, to which he made default, the plaintiff was nonsuited. The tenant then refused to quit, and declared he would do as much mischief as he could. Various instances of wilful waste were sworn to, and the tenant had, among other things, threatened to plough up meadows. On this state of circumstances, he was restrained from carrying away dung, crops, and corn, and from ploughing up meadows, and from committing other waste.

Again, in *Lord Grey de Wilton v. Saxon* (n), although Lord Eldon doubted whether he could grant an injunction against waste, on the mere ground of converting meadow land to other purposes, unless on affidavit that it was ancient meadow, yet he granted the injunction, on the ground of there being in the lease an express covenant against such conversion. And it has been decided, that the principle

(m) 5 Ves. 260, *notis*.

(n) 6 Ves. 106.

that a tenant must treat the farm in a husbandlike manner, according to the custom of the country, applies as well to a tenancy from year to year, as to a tenancy for a longer time; and therefore a tenant from year to year, who has received notice to quit, will be restrained on affidavits from taking away crops, &c., except according to the custom of the country (*o*).

And a tenant from year to year under covenants to cultivate in a husbandlike manner, has been restrained on an *ex parte* application (supported of course by the usual affidavits verifying the allegations of the bill), generally from waste, and, among other things, from ploughing up ancient meadow or old pasture land; and from sowing any part of the land with mustard seed, or any other pernicious crop (*p*).

27. There are two cases which are contrary to the cases above cited, on the subject of covenants to cultivate in a husbandlike manner, not to plough, &c. One is a case of *Latthropp v. Marsh*(*q*), in which, although there was an express covenant not to plough meadow, and to manure the land in a husbandlike manner; and although it was sworn that the tenant sowed winter corn without manure, and threatened to plough meadow, and commit all the waste he could, yet the Court refused to grant an injunction, distinguishing the case from *Pulteney v. Shelton*, on the ground that in the latter an ejectment had been brought.

The other is a case in the Exchequer, in which the defendant was tenant under a covenant to spend on the premises all the hay, straw, and holm arising in the last three years; and an injunction to restrain him from carrying away straw and dung in the last year, and from ploughing up an excessive quantity of land, was refused, on the ground that it was not irremediable injury. As to the ploughing, the Court distinguished between this and the plough-

(*o*) *Onslow v. —*, 16 Ves. 173.

(*q*) 5 Ves. 259.

(*p*) *Pratt v. Brett*, 2 Mad. 62.

ing of ancient meadow, and thought that it was a question of the proper quantity of land to be cropped; and as to the straw and manure, that it was merely *breach of contract* (r).

It is difficult to account on principle for the decision in these two cases; and the weight of authority appears, I conceive, by the cases to which I have referred, to be in support of the proposition, that where there is an express or implied covenant on the part of the lessee to cultivate in a husbandlike manner, not to plough pasture, &c., or to a similar effect, an injunction will be granted to restrain acts inconsistent with such covenant.

28. With regard to the question what is ancient pasture, it has been held, that where pastures have been ploughed within six years before the beginning of a lease, they are not ancient pastures, although they may have remained for thirty years during the lease unploughed, and the tenant will not be restrained from ploughing them. But it seems it would be otherwise, if during so long a period of time they were out of lease and unploughed (s). And it has been held in a case in Ireland, that as between remainderman and tenant for life, it is not waste to plough up pasture land held under leases, unless it was pasture at the date of the lease (t).

29. Before concluding the subject of converting meadow land, I will advert to a case (u) in which the question was, whether the governors of the Foundling Hospital should be restrained from proceeding in the execution of contracts for letting the open fields surrounding the hospital upon building leases. The case was argued chiefly on the ground that the original design was to have the hospital in the

(r) *Johnson v. Goldswaine*, 3 Anst.

749.

(s) *Gering v. Gering*, 3 Swans. 661.

Lord Nott. MS.

(t) *Morris v. Morris*, 110g. 238.

(u) *Attorney General v. Foundling*

Hospital, 2 Ves. jun. 42.

country for the health of the children; that the funds of the hospital were ample for its purposes, and the risk of the building leases ought not to be incurred; and that the contracts were improvident. But the Court, admitting that where the governors of a charity have the management of the revenues, and are abusing their trust, the Court has jurisdiction, was of opinion, 1. That it was not made out that the hospital being in the country was part of the original plan; 2. That there was no sufficient evidence that the plan proposed would endanger the health of the children; 3. That viewing the terms on which the leases already were made, it was impossible to treat the conversion of meadow into building ground as waste; and 4. That in other respects, there was nothing to show that the governors were dealing improvidently, or to rebut the presumption that they were doing their duty as trustees; and the injunction was refused (*x*).

30. In Ireland leases for lives, with covenants for perpetual renewal, are considered, it seems, as perpetuities; and a tenant under such a lease will not be restrained from raising limestone (*y*), unless there is an express reservation against quarrying in the lease; and to that extent an injunction will be sustained; nor from cutting timber (*z*); but if he owes a large arrear of rent, and refuses to pay it, and threatens to commit waste and leave the country, it will be otherwise, as then his interest cannot be reasoned on as a perpetuity (*a*).

A tenant cutting turf for his own use has been held in

(*x*) I have stated this case, and the grounds of the decision in it, more fully than would otherwise have been necessary, on account of its being cited by Mr. Eden, in his Treatise on Injunctions, as an authority for the position, "that an injunction has been refused to restrain the burning of bricks near the habitations of men" (Eden on In-

junctions, p. 226), a position which does not appear to have been directly decided by this case.

(*y*) *Calvert v. Gason*, 2 Sch. & Lef. 561.

(*z*) *Conolly v. Lord Ely*, 2 Mol. 515: and see *Percy v. Shanly*, *ibid*.

(*a*) *Pim v. Davies*, Hog. 11; *White v. Nowlan*, Hog. 21.

Ireland not guilty of waste (*b*); but a tenant will be restrained from cutting turf for sale contrary to his lease, which only allowed him a right of cut-over. It is no defence to a bill for an injunction in such a case, that the tenant, and those under whom he derives, have been used to cut turf for sale for eighty years; for the abuse of a right as between tenant and landlord, for however long, cannot give the tenant a right, and his rights are only to be ascertained by the lease (*c*).

31. Again, in another case (*d*) the same distinction was taken, Lord Redesdale refusing to restrain a tenant from cutting turf, on the ground, as it appears, that the tenant was entitled to turf for firebote, and that the affidavit to support an injunction ought to have stated that the turf was taken for sale. The observations of the Court, according to the report, are not very intelligible: the Lord Chancellor is said to have distinguished the case from that of *Mitchell v. Dors*, saying, "that is waste; this is not."

Now the case of *Mitchell v. Dors* (*e*) was expressly treated by Lord Eldon as a case of *trespass*, and not of waste; while on the other hand, the cutting by a tenant of more turf than he is entitled to, is, it is submitted, if not actually waste, trespass in the nature of waste, by destruction of the inheritance (*f*).

32. There are also many cases in which equity has interfered, to prevent particular acts in the nature of waste by tenants for years of houses; and this will be done even in the absence of express covenant against such acts of waste. Thus, if a person applies for and obtains an agreement for a lease of a house, on the faith of his wanting it for a

(*b*) *Count de Salis v. —*, 2 Mol. B. 188.
516.

(*c*) 6 Ves. 147.

(*e*) *Lord Courtown v. Ward*, 1 Sch. & Lef. 8.

(*f*) See *Crockford v. Alexander*, 15 Ves. 138, *E. Couper v. Baker*, 17

(*d*) *De Salis v. Crossan*, 1 Ball & Ves. 128.

private dwelling house, and not to carry on any trade, the lessee agreeing to expend a certain sum in repairs under the direction of the lessor; the lessee taking possession under that agreement will be restrained from altering the house for carrying on a business in a manner that destroys its fitness for a private dwelling house (*g*). But it has been held, that a lessee will not be restrained before answer from doing that which is in effect carrying on his trade, although it is sworn that what he does is likely to injure the lessor's buildings, and that people are afraid to live in the buildings; for if he does any special injury, the lessor has his recompense by an action for damages (*h*).

33. An injunction will be granted to restrain a tenant for years from destroying a dove-cote, but not from removing presses, unless they are fixed to the freehold (*i*). And where a lease, with express covenants to repair and for cultivation, turns out to be void, the tenant holding over will not be of necessity restrained from doing acts which would be waste under the lease, although such acts are alleged to be *contrary* to the custom of the country, unless they amount to clear waste, without reference to the lease; as it does not follow that the same relation subsists between the landlord, and the tenant holding over, as would subsist between them under the lease (*k*).

It has been decided on demurrer, that a covenant by the lessee to deliver up at the end of the term in good repair, has not the effect of preventing him from being restrained during the term from pulling down the premises, and carrying away the material (*l*). It may appear somewhat strange that such a point should ever have been raised, as a case of this nature seems to stand on the same principle as the numerous cases to which I have referred,

(*g*) *Bonnett v. Sadler*, 14 Ves. 526. 349.

(*h*) *Jackson v. Bernard*, Ridg. (*k*) *Ibid*.

259. (*l*) *Mayor of London v. Hedger*, 18

(*i*) *Kimpton v. Eve*, 2 Ves. & Bea. Ves. 355.

where equity does not leave the lessor to his remedy at law for breach of covenant committed, but interposes to prevent the destruction which would be produced by breach of the covenant.

34. The question whether tenant in tail after possibility of issue extinct can cut timber, seems to have been formerly the subject of doubt^(l). But it has long been settled that tenant in tail after possibility of issue extinct, who has once been tenant in tail *in possession*, may cut timber, and has the property in the timber when cut, or, as it is stated in the old cases, is in every respect as unimpeachable for waste, as tenant for life who is made so by express limitation^(m).

35. There is also now strong ground for conceiving that where there is tenant in tail after possibility of issue extinct in remainder, who has never been tenant in tail in possession, such tenant may cut timber, and is entitled to it when cut. This point was in effect decided at law in *Williams v. Williams*⁽ⁿ⁾, in which the limitations material to this point were to the husband for life *without impeachment*; remainder to trustees to preserve; remainder to the wife for life, for her jointure; remainder to the sons successively, and the heirs male of their bodies; remainder to the daughters in like manner. In default of such issue, remainder to the heirs of the bodies of the husband and wife. The husband died without issue. Lord Eldon doubted whether the wife was tenant in tail after possibility of issue extinct, within the reasoning of the old cases, in none of which, his Lordship said, tenant in tail after possibility was said to be punishable of waste, where that tenant had not been once tenant in tail with the other

(l) See the arguments and judgments in *Williams v. Williams*, 15 Ves. 419, and see *Leicis Boules's case*, 11 Rep. 80; Litt. s. 352; Co. Litt. 27 b; *Abraham v. Bubb*, 2 Freem. 53;

Am. id. 278.

(m) 15 Ves. 430; and see Eden on Injun. 183.

(n) 12 East, 209.

donee in possession. A case was directed to the Court of King's Bench, who certified, 1, That the wife was unimpeachable of waste; 2, That having cut timber she was entitled to the timber as her own property; 3, That she became tenant in tail after possibility of issue extinct.

The third answer clearly does not meet the difficulty suggested by Lord Eldon, who did not doubt that under such limitations she would be tenant in tail after possibility of issue extinct, in some sense, but whether there was not a distinction between a tenant in tail in remainder who had, and one who never had had the inheritance in possession; but although the point raised by Lord Eldon does not seem to have been argued in the Court of King's Bench (*n*), yet as the limitations were before the Court, and as having those limitations before them, the judges were of opinion that the wife was unimpeachable of waste; it is to be presumed that as regards liability to waste at least, there is no distinction between a person taking under such a limitation, and a tenant in tail after possibility, who has been in possession.

36. Although however tenant in tail after possibility of issue extinct, is without impeachment of waste, yet he will be restrained from malicious or destructive waste, such as cutting down trees being for shelter or ornament; pulling down houses (*o*), or any other malicious or destructive waste. In these cases the distinction between trees *planted* for ornament, and trees *being* ornamental, does not seem to have been attended to; but no doubt the Court would now follow the same principle in that respect in regard to tenant in tail after possibility, which it applies to tenant for life without impeachment for waste.

Although tenant in tail after possibility of issue extinct needs not attorn, that privilege is in respect of his person

(*n*) See 12 East, 209.

see 2 Swans. 172; *Anon.* 2 Free. 278;

(*o*) *Abraham v. Bubb*, 2 Freem. 53;

Cooke v. Whalley, 1 Eq. Ab. 400.

and not of his estate, and is destroyed by assignment, and therefore his assignee must affirm (p). And it is to be presumed that the assignee would be restrained, as mere tenant for life, from every kind of waste.

37. Tenant in dower (q), and by the curtesy (r), may not commit waste.

38. In general, equity will not interfere between tenants in common to restrain waste, not amounting to destruction, on these grounds,—that one tenant in common has a right to enjoy as he pleases; that the party complaining may relieve himself at law by the writ of partition, and the Court will not act against the legal title to possession of a tenant in common (s). The Court will, however, restrain, where the affidavit of the plaintiff swears that the tenant in possession is insolvent, and unable to pay to his co-tenants their shares of the money produced by the sale of the timber cut (t); or where the waste amounts to malicious destruction, or cutting saplings and timber trees, or underwood at unseasonable times; but not against mere equitable waste, as cutting down mere ornamental trees (u). The same doctrine was distinctly laid down in *Ticot v. Ticot* (x). In a very late case, where there being four tenants in common, three agreed to grant a lease of the land to a railway company, but A., the fourth, refused; and notwithstanding that, the company entered and constructed a railway, and then A. recovered against them in ejectment; the Court refused an injunction to restrain A. from pulling down the works of the company (y). But if

(p) *Ap Rice's case*, 3 Leon. 241.

(q) Co. Litt. 53 a.

(r) *Roberts v. Roberts*, Hard. 96.

(s) *Hale v. Thomas*, 7 Ves. 509; 1 Sim. & Stu. 114; *Goodwin v. Spang*, Dick. 667.

(t) *Smithway v. Osmund*, 3 Br. C. C. 1121.

(u) *Hale v. Thomas*, above cited.

(x) 16 Ves. 127.

(y) *Durham and Sunderland Railway Company v. Ward*, 4 Jurist, 764; and see 1 Railway Cases.

one tenant in common will occupy the whole as tenant to the other, he contracts thereby to occupy one moiety of the land as any other occupying tenant would do, and he will then be restrained, by an order stating expressly that he is the occupying tenant to the plaintiff, from committing any waste on the premises which he holds as such occupying tenant(z).

39. As between mortgagor and mortgagee, the mortgagee is entitled to an injunction to restrain the mortgagor in possession from cutting timber to the injury of the security(a). But in modern times, to obtain such an injunction, it must be sworn that the land is a scanty security without the timber(b). But although a mortgagor, who is a bankrupt, will be restrained from cutting underwood, yet bankruptcy is the only ground for such an injunction, and it will not be granted because the mortgagor is in prison for debt. But he may be restrained from cutting it contrary to the usual course of husbandry(c). In general, indeed, if a mortgagee will not take possession, it is not waste in the mortgagor to cut underwood at seasonable times; but where a mortgagor, who had mortgaged timber trees, wood, and underwood, became bankrupt, and cut underwood before assignees were chosen, Lord Chancellor said there was this specialty in it, that the mortgagee had a right to have the estate in that plight in which it was at the date of the bankruptcy, and to prove for the rest of the debt; and granted an injunction on that ground till answer or further order(d). And even where the mortgagor becomes insolvent or bankrupt, an injunction will not be granted to restrain cutting timber, unless the mortgagee will show that

(z) *Twort v. Twort*, 16 Ves. 128.

(a) *Humphreys v. Harrison*, 1 Jac. & W. 581; see also *Robinson v. Litton*, 3 Atk. 210; *Farrant v. Lovel*, id. 723; *Usborn v. Usborn*, 1 Dick. 75; *Hopkins v. Monk*, *ibid.*; *Uvedale*

v. Uvedale, cited *ibid.* and 3 Atk. 119.

(b) *Hippesley v. Spencer*, 5 Mad. 422.

(c) *Humphreys v. Harrison*, cited above.

(d) *Hampton v. Hodges*, 8 Ves. 105.

by such waste the security will be so reduced as to become an inadequate security (e).

Where a party has contracted to sell an estate to another, who takes possession, the purchaser is in equity the owner, and the vendor an equitable mortgagee, and though at law the purchaser is a trespasser, yet equity will restrain him from destructive waste, such as cutting timber, &c. (f).

A mortgagee in possession will also be restrained from cutting timber (g), if he do not apply the money arising by the sale of the timber in sinking the interest and principal of his mortgage. But he is not bound to leave the buildings on the mortgaged estate, after a long possession, in as good condition as he found them (h). But where there are first and subsequent mortgagees, and the mortgagor is in possession and has appointed a receiver, if the first mortgagees do not claim to take possession and receive the rents, the receiver will be restrained at the suit of the subsequent incumbrancers from paying any of the rents to the mortgagor (i).

40. It seems to flow from the very nature of the duties of express trustees that they cannot commit waste; and an injunction will also be granted to restrain waste by implied trustees. Thus where a testator devised that from his death until his daughter attained twenty-one, or married with consent of her mother, the mother should receive all the rents and profits of certain lands, with directions to pay 300*l.* per annum to the daughter, and to take 900*l.* for herself; the mother was restrained from cutting down timber growing among underwood, although on a suggestion that it would not improve.

41. There has been much discussion whether a bill for

(e) *Cox v. Goodfellow*, 8 Ves. 105, n. 84.

(f) *Crockford v. Alexander*, 15 Ves. 138.

(g) *Tarrant v. Lloyd*, 3 Ark. 723.

(h) *Russell v. Smith*, 1 Anst. 96.

(i) *Dalmer v. Dashwood*, 2 Cox, 378.

an account of waste merely, will lie without an injunction. In a case arising upon waste in copyhold lands by opening new mines, it was held that where there is no custom of the manor that the tenant may dig and open new mines, neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, may open new mines. And that if the copyhold tenant, where there is no such custom, opens new mines and digs great quantities of ore and dies, the Court will hold his executors liable to account for the ore dug up (*k*). The Lord Chancellor in that case seems to have thought that a bill for an account merely, would lie for waste in cutting timber. For his Lordship, admitting that as to waste by breaking up meadow or ancient pasture, the remedy died with the person, distinguished as to ore or timber, saying, "it would be a reproach to equity to say where a man has taken my *property*, as my ore or timber, and disposed of it in his lifetime and dies, that in this case I must be without remedy." The application of this principle seems, however, on the result of the authorities, not to go beyond the case of mines, at least wherever there is a remedy at law. In *Jesus College v. Bloom* (*l*) Lord Hardwicke spoke with disapprobation of the foregoing case, so far as regarded the doctrine in reference to cutting timber; and he puts the decision in it as being on the ground that it was a case on mines. "The Court," he said, "always distinguishes between digging mines and cutting timber, because the digging of mines is a species of trade." It is clear however, from the language used by the Lord Chancellor in the case in *P. Williams*, that he put his decision, not on the ground of its being a case of mines, but on the ground of there being a perception of the *property* and the wrong-doer dead, as distinguished from waste of the nature of a mere *tort*. In *Jesus College v. Bloom* the bill was for an account simply, without praying an injunction, and on that ground

(*k*) *Bishop of Winchester v. Knight*,

(*l*) 3 Atk. 262; Amb. 54.

1 P. Wms. 406.

expressly, as it is reported in *Audley*, his Lordship dismissed the bill. And according to the report in *Atkyn*, his Lordship said, "the first question is, whether bills ought to be entertained merely for satisfaction for timber cut down after the estate of the tenant that cut it down is determined, by assignment or otherwise, without praying an injunction, and I am of opinion they ought not to."

In *Garth v. Cotton* Lord Hardwicke has been thought, it is true, to impugn the authority of his own decision in *Jesus College v. Bloom* (e); but his Lordship, as it is observed by Lord Brougham in *Parrott v. Palmer* (n), does not overthrow its doctrine, because he takes the distinction that in the one case (*Jesus College v. Bloom*) there was a legal remedy, and in the other no remedy. In *Whitfield v. Bewitt* (o), where it was held that if a tenant for life, not dispossessible of waste, cut timber, it belongs to the owner of the inheritance; an account of timber cut without any injunction being prayed for, was granted to the remainderman against the tenant for life: but in that case an injunction was prayed against opening mines. So that, as observed by Lord Hardwicke in *Garth v. Cotton*, and by Lord Brougham in *Parrott v. Palmer*, this case does not contradict *Jesus College v. Bloom*, as the Court seems to have given the account as incident to *discovery*, because it would be impossible for him to discover the value of the timber. Moreover, it is clear that there was nothing in this case which, of its own nature, would have prevented an injunction from being grantable, and it was owing to the collateral circumstances of the timber being actually cut that it could not be asked for or granted. In the latest case in which this doctrine was discussed, Lord Brougham, C., after elaborately reviewing the authorities (p),

(l) 3 Atk. 262.

(m) See 3 Atk. 756, third objection.

(n) 3 My. & K. 641.

(o) 2 P. Wms. 249.

(f) *Jesus College v. Bloom*, 3 Atk.

262; *Whitfield v. Bewitt*, 2 P. Wms.

249; *Sayer v. Pierce*, 1 Ves. sen.

232; *Garth v. Cotton*, Dick. 183.

lays it down, that in waste, although as to timber there exists considerable discrepancy, yet the sound rule is, to make account the incident and not the principal, where there is a remedy at law ; but that mines are to be otherwise considered, and that as to them the party may have an account, even in cases where no injunction will lie (*q*).

The doctrine resulting from all the cases seems to be that, 1, As to *timber*, where there is a remedy at law, account must be the incident and not the principal (*r*) ; but where the waste is purely equitable, viz., of such a nature that under no state of circumstances could a remedy at law be had, a bill will lie for an account merely, as against the personal representatives of the tenant for life who has committed such equitable waste (*s*). 2. That as to mines, a bill for an account will lie, without reference to whether there is or is not a remedy at law (*t*).^{*} Perhaps a distinction exists that where the plaintiff has not such a case as would of itself form ground for the interposition of equity by injunction, he cannot have account alone ; but where he might have an injunction from the nature of the case, and is only deprived of it by reason of some accidental collateral circumstances, there he may have account (*u*).

It is proper to observe on the subject of account, that where in the case of mines there is a dispute as to whether the mines under a certain close belong to A. or B., and an

(*q*) 3 Myl. & K. 632 ; *vide* p. 642.

(*r*) *Per* Lord Brougham, 3 Myl. & K. 642 ; *et vide* 9 Ves. 346.

(*s*) *Garth v. Cotton ; Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Mad. 116. It is to be observed that in the last case referred to, an injunction had been obtained against the tenant for life who died pending an application to dissolve it. But this circumstance does not seem

to have affected the determination, which the Court put on the broad ground, that where equitable waste has been committed, which never could have been authorized, the Court has jurisdiction to make the representative of the party committing such waste accountable.

(*t*) See the cases cited above.

(*u*) *Bailey v. Taylor*, 1 Russ. & Myl. 73.

injunction has been granted to restrain B. from working, and is afterwards dissolved on B.'s undertaking for himself and his lessees that a true account shall be kept; that account ought to be kept, so as clearly to distinguish the mine got from under the close in question, from that got from any adjoining mines belonging to B., and therefore, if a verdict is found for A., and it is impossible to distinguish the mine got from under the disputed close from that which has been got from adjoining workings, B. must be charged with the whole, except what he can prove to have come from other mines (*y*).

42. An injunction will be granted at the suit of a copyholder to restrain the lord of the manor from opening a mine on the plaintiff's copyhold land; and where the right of the lord is doubtful, from cutting timber; as the question whether the lord can, without a special custom, open a mine, ought to be tried at law, and the Court interferes to prevent irreparable mischief in the meantime (*z*). There is a distinction, however, between opening a mine, and working one already opened (*a*). But in such cases the injunction will only be upheld on the understanding that the right will be speedily tried at law (*b*). And a lord of a manor may have an injunction against the tenants of the copyhold lands, to restrain them from committing waste. This was denied in a case of *Dench v. Bampton* (*c*), but that case has been overruled by Lord Eldon in *Richards v. Noble* (*d*); and the doctrine of the latter case is confirmed by a very late decision (*e*). But if the lord has been guilty of laches, as where the bill is to restrain the

(*y*) *Lupton v. White*, 15 Ves. 432. 208.

(*z*) *Grey v. Duke of Northumberland*, 13 Ves. 236; *Whitechurch v. Holworthy*, 19 Ves. 213; *Player v. Jones*, Sir W. Jones, 241.

(*a*) *Grey v. Duke of Northumberland*, 13 Ves. 236; and see 1 Swans.

(*b*) *Grey v. Duke of Northumberland*, 17 Ves. 281.

(*c*) 4 Ves. 700.

(*d*) 3 Mer. 673.

(*e*) *Parrott v. Palmer*, 3 My. & K.

632.

working of mines, and the lord has stood by and allowed the tenants to work the mines for a long time, equity will not interfere in his favor by injunction (*f*).

43. A parson may not commit waste, nor open mines on the glebe lands; and a case is mentioned of a bishop applying to parliament for leave to open mines, and being refused (*g*); but a parson may work mines already opened. So he may fell timber, or dig stone to repair, and may sell the timber or stone, where the money is applied in repairs (*h*). This doctrine, as to cutting timber or digging stone by ecclesiastical corporations, has been approved in subsequent cases (*i*).

In the case of *Wither v. Dean and Chapter of Winchester* (*k*), the Dean and Chapter were lessors of the plaintiff, and the lease contained a reservation of timber to the lessors, who covenanted not to take timber on certain parts, except for the necessary repairs of Winchester Cathedral. The lessors were about to cut timber, and on a motion to dissolve an injunction obtained *ex parte*, the question appears to have been whether they could cut for the purpose of selling to defray the expense of repairs; or whether they could be restrained by the lessees from cutting, except in so far as they required to apply the actual timber cut, in repairs. They stated by their answer, that the whole of the timber would be less than sufficient for the necessary repairs of the church. Lord Eldon held, that independently of the covenant, the lessees were strangers as regarded the right of their lessors to cut timber; and that the covenant did not alter the situation of the parties as to the right intended to be reserved by it. And as the lessors would not have been bound, independently of the covenant, to apply the specific timber cut in

(*f*) *Parrott v. Palmer*, 3 My. & K. 632.

(*h*) *Knight v. Moseley*, Amb. 176.

(*g*) *Talbot's case*, cited by the Lord Chancellor in *Knight v. Moseley*, Amb. 176.

(*i*) *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421.

(*k*) 3 Mer. 421.

repairs, they were not so bound by the covenant. And his Lordship dissolved the injunction.

But an ecclesiastical corporation cannot cut timber, except for the purpose of repairing or defraying the expense of repairing the church; and, therefore, where the plaintiffs claimed, as the lessees of certain woods held under an ecclesiastical corporation, a general right to cut timber, alleging that such right passed to them by the terms of the lease, the Court held, that on the authority of *Jefferson v. Bishop of Durham* (l), and *Wither v. Dean and Chapter of Winchester* (m), the lessors had themselves no power to cut timber, except for the purpose of the repairs of the church, and therefore they could not grant such to the lessees (n). By the lease the woods were demised, reserving to the lessors, at every fall of such woods, certain standells or stours, (which, it appears, means young trees left standing, in order to become timber).

On the construction of the lease, the Court held that it did not impart the conveyance to the lessees of any general right of cutting timber, such as they claimed; and further, that if the lessors had affected to transfer such a right, or, in other words, if on the true construction of the lease, such a right, supposing it to exist in the lessors, would have passed to the lessees, yet the lessors not having it, the lease, if intended to give such a right, would be a direct violation of the law, and, therefore, not such a transaction, as a Court of equity would carry into effect. On these grounds the Court dismissed with costs a bill filed by the lessees for an account of timber cut, and for an injunction (o).

Again, in an old case (p), the lessee of a bishop was restrained until the hearing of the cause from cutting timber, except for necessary repairs of the manor house, which

(l) 1 Bos. & Pul. 105.

(o) *Ibid.*

(m) Cited *ante*, 169.

(p) *Bishop of Winchester v. Wel-*

(n) *Herring v. Dean and Chapter of St. Paul*, 3 Swans. 492.

gar, 3 Swans. 493, *note*.

it appeared was in danger of going to ruin. And in another case (*q*), a prebendary was restrained from cutting timber on his prebend, by a writ of prohibition. In that case, however, it seems that the Court would have permitted him to cut enough timber for the repairs of the house.

So a rector will be restrained, at the suit of the patron, from cutting down timber in the churchyard, except for the repairs of the parsonage house or the church, or for repairing old pews which belong to the rectory; although he is not bound, as appears by the cases which I have cited, to apply the identical timber to the repairs, but may sell it, provided the money is applied in the repairs (*r*).

In the case last referred to, Lord Hardwicke also laid it down, that he is entitled to botes for repairing barns and outhouses belonging to the parsonage. And if it is the custom of the country, he may cut down *underwood* for *any purpose*; but if he grub it up, it is waste.

The tenants of ecclesiastical corporations are, as to the right of such corporations of committing waste, strangers, unless by virtue of special covenants, and cannot interfere to restrain them from waste; that can only be done as against a bishop by prohibition, or by injunction, at the suit of the crown; and as against a rector, by the patron (*s*).

And although the fee simple is in abeyance during the vacancy of a rectory, yet the patroness has a sufficient interest to support an injunction to restrain the widow of the late rector from committing waste (*t*).

The tenant for years of a bishop *sans waste* will be restrained from digging away the soil for bricks to the extent of destruction (*u*).

(*q*) *Ackland v. Attwell*, 3 Swans. 499, *notis*.

(*r*) *Strachy v. Frances*, 2 Atk. 217; see also *Bradley v. Strachy*, Barn. 399.

(*s*) 3 Mer. 427; *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 105; *Knight v. Moseley*, Amb. 176.

(*t*) *Hoskins v. Featherstone*, 2 Br. C. C. 552.

(*u*) *Bishop of London v. Webb*, 1 P. Wms. 527; and see *Bishop of Winchester's case*, cited 2 Freem. 55, as to cutting trees by the tenant of a bishop.

44. There seems considerable ground for doubt when an injunction will be granted against *permissive* waste. A case of *Caldwell v. Baylis* (x) has been treated by a learned writer on this subject (y), and has been referred to in other books, as an authority that an injunction will be granted to restrain permissive as well as voluntary waste. The case, however, does not seem fully to warrant so decided a conclusion. The defendant in *Caldwell v. Baylis* took under a devise to him for life, "he keeping the interest of a certain mortgage charged on the premises paid, and keeping the buildings in tenantable repair, and not felling any timber, except for repairs."

He suffered the buildings to go to decay, notwithstanding repeated remonstrances on the part of the plaintiff, who claimed as remainder-man under the same devise. It does not appear by the report on what ground the injunction was granted. It might well have been granted on the special ground of the proviso in the will, and the decision does not of necessity afford any inference in favor of the general doctrine, that, without a specific obligation on the tenant for life, he would be restrained from permitting waste. It should be observed also, that the authority of this case on a doubtful point, is much weakened by the circumstance that the injunction was granted *ex parte*.

In an earlier case, before Lord Hardwicke (z), a decision was made, bearing more directly on the point. In that case exceptions being taken in a cause to the Master's report, that he had charged the tenant for life without impeachment of waste, with several sums for repairs of tenant's houses upon the estate, the Lord Chancellor overruled the exception, saying, that "notwithstanding tenant for life is without impeachment of waste, he shall be obliged to keep tenant's houses in repair, unless the charge is excessive, and shall not suffer them to run to decay."

(x) 2 Mer. 408.

(y) Eden on Injunctions, 160.

(z) *Porter v. Paullet*, 2 Atk.

343.

But in a later case, decided in Michaelmas term, 1773 (*a*), where the tenant for life cut timber, and suffered some of the houses to go out of repair; as to the timber, the Court held that an injunction might have been granted; but as to the repairs, the Lord Chancellor refused to interfere, saying, “the Court never interferes in case of *permissive* waste, either to prohibit or give satisfaction, as it does in *wilful* waste.”

In *Turner v. Buck* (*b*), a bill was brought against the executors of a jointress for satisfaction out of assets for permissive waste, and Cowper, C., refused to interfere, “for here,” said his Lordship, “is *no covenant* that the jointress shall keep the jointure in good repair, and in the common case, without some particular circumstances, there is no remedy in law or equity for permissive waste after the death of the *particular tenant*.”

Again, in a case in *Ambler* (*c*), where a bill was filed by a remainder-man against tenant for life to have, among other things, a decree for repairs of a brewhouse, part of the devised premises, the Court said, “that as there was no precedent, it would not make one.”

In a late case the question arose, whether a decree for an account of dilapidations permitted in and about the mansion-house by tenant for life could be made. And Sir J. Leach, M. R., expressed himself satisfied that no such account could be decreed, observing that with respect to incumbents the law was otherwise, and accordingly suits against their representatives were very common; but no instances of such suits by remainder-men had occurred (*d*).

In that case it was urged that the account ought to be granted on the doctrine laid down by the Court in *Lord Ormond v. Kinnersley* (*e*), that an account of equitable

(*a*) *Lord Castlemain v. Lord Cra-*
ven, 22 Vin. Abr. 523, s. 11.

(*b*) 22 Vin. Abr. tit. Waste, 523,
s. 9.

(*c*) *Wood v. Gaynon*, Amb. 395.

(*d*) *Marquis of Lansdown v. Mar-*
chioness Dowager of Lansdown, 1 Jac.
& W. 522.

(*e*) 5 Mad. 369.

waste might be decreed on the principle of considering the tenant for life as holding subject to an *implied trust* to exercise his rights without injury to the remainder-man, and that the principle applies as well to permissive as to voluntary waste. But it is to be observed that in the case of *Lord Ormville v. Kennerley*, his Honor the Vice-Chancellor was dealing with a question of equitable waste by tenant for life without impeachment, with reference to the right of the remainder-man to an account of such waste against the executors of the tenant for life. The principle there laid down would no doubt be as applicable to a question between the executors of tenant for life and remainder-man in a case of permissive as of voluntary waste, if the tenant for life himself is liable for permissive waste; but it does not touch the question whether he is or is not.

45. These are all the cases of which I am aware, in which the subject of permissive waste has been discussed. And while only two are to be found in which the exact point occurred (*f*), and those are in direct opposition to each other, it is not possible to say that either opinion can be confidently relied upon. The preponderance of authority collaterally bearing on the subject seems, however, in favour of the position, that against permissive waste *simpliciter* by a tenant for life or for years, not affected by any express agreement or proviso, equity will not interfere by injunction; and that at any rate no account of permissive waste will be given against the representatives of such tenants.

46. It may be further urged in favour of this opinion, that although from what is stated by Lord Coke (*g*), his opinion appears to have been that at law there was an action for permissive waste, and although that opinion is stated as law by Mr. Serjeant Williams in his notes to

(*f*) *Pastoride v. Poulet*, and *Lord Castleman v. Lord Craven*, *ante*. (*g*) *Co. Lit.* 53 a.

Saunders (*h*), yet that doctrine is shaken, to say the least, by later cases. In *Gibson v. Cole* (*i*) it was determined that no action could be maintained against tenant from year to year for permissive waste only. And in *Horne v. Benbow* (*k*) it was held that action on the case would not lie against tenant for years who has not covenanted to repair. If then there is no remedy at law for permissive waste, or even if the existence of that remedy be merely doubtful, it must be difficult to show upon principle that equity would interfere; since it has been repeatedly laid down by the Courts of equity (*l*), that in injuries to property of the nature of waste, equity proceeds on the assumption that there is a legal right, and acts only as ancillary to that right. The ground of the interference of equity in such cases is not the non-existence of any remedy at all at law, but the circumstance that the remedy at law is inadequate or inconvenient. Upon principle, therefore, it may be questioned, whether, if from the nature of the subject, it is doubtful whether an action can be brought, equity would hold the legal right to have such an existence as to call for its interference to protect it. It is also to be observed, that an injunction against permissive waste would be in effect an injunction to do a substantive act, which, it will be shown (*m*) in a subsequent part of these sheets, cannot be granted directly. Whether the doctrine of the cases (*n*) on orders to refrain from leaving a thing undone, would be applied to permissive waste, must, in the absence of any decision or even dictum, be a question of very great doubt.

An account of *equitable* waste will, however, be granted against the representative of a deceased tenant for life, on the ground that the restraint on the legal owner, as to waste,

(*h*) 1 Saun. 323 b, No. 7.

parts of this work.

(*i*) 4 Bos. & Pull. 291.

(*m*) *Post*, chap. vi.

(*k*) 4 Taunt. 764, n. (*b*).

(*n*) *Robinson v. Lord Byron*, 1 Br.

(*l*) *Bacon v. Jones*, 4 My. & Cr. 433. This doctrine will be found frequently referred to in subsequent

C. C. 588; *Lane v. Newdigate*, 10 Ves. 192; *Rankin v. Huskisson*, 4 Sim. 13.

is to be considered as founded on a breach of that trust or confidence which the devisor reposes in the tenant for life, that he will use his legal estate only for the purpose of his enjoyment; that it is a trust implied in equity from the subsequent limitations, and from the presumed intention of the testator, that he meant an equal benefit to all in succession; and that in all cases the assets of a testator are answerable for a profit made by a breach of trust (o).

47. There are many acts which are analogous to waste, against which injunctions will be granted on the same principle as injunctions against waste, properly so called. Thus generally an injunction will be granted to restrain an executor from receiving the assets of his testator, where it appears that they are in danger of being wasted in his hands (p).

So a feme executrix will be restrained from getting in the assets of the testator, if her husband is abroad, and therefore not amenable to the process of the Court (q). But a woman, administratrix of her husband, who died intestate, leaving no children, will only be restrained as to two-thirds of the intestate's personal estate, as she is entitled to one-third for her own use (r).

On the same principle, of preventing irremediable mischief, an injunction was granted in an early case till answer or further order to restrain the negotiation of a promissory note given on a marriage brokerage agreement; the Lord Chancellor distinguishing this case from an injunction to stay proceedings at law on such a note, which could not be granted till after appearance, except in certain cases; whereas the negotiation of the note might be said to be restrained on the same principle that executors are restrained *pendente lite* in the ecclesiastical Court, as the plaintiff

(o) *Marquis of Ormonde v. Kynersley*, 5 Mad. 369.

(p) *Harrison v. Cocherell*, 3 Mer. 1.

(q) *Taylor v. Allen*, 2 Atk. 213.

(r) *Rogers v. Rogers*, 1 Anst. 174.

would be without remedy, if the note were disposed of for valuable consideration without notice (s).

48. It is now a perfectly settled jurisdiction of equity to restrain a person from interfering with the personal estate of a testator or intestate, pending litigation in the ecclesiastical Courts respecting the grant of probate or of letters of administration. Thus where opposite claims had been set up in the ecclesiastical Court under different wills, and a decision had been made that one will was not sufficiently proved, the Court restrained the defendant from transferring any stock, pending the litigation (t). So in a case where there was great presumption of fraud in obtaining the signature of a testator to an alleged will, the next of kin having instituted a suit in the ecclesiastical Court to recall the probate granted to the alleged executors, a receiver and injunction were granted on an *ex parte* motion, on affidavit of the truth of the allegations contained in the bill (u). And the point expressly decided in an earlier case of *Ball v. Oliver* (x) shows, that the principle on which the Court of Chancery interferes to preserve personal property, pending a litigation in the ecclesiastical Courts, is applicable to cases where probate or administration has been already granted, and the suit is to recall it, as well as as to cases where no probate or administration has been granted. The principles on which the jurisdiction of the Court is founded, and on which its exercise of that jurisdiction is regulated, are well explained by the case of *Watkins v. Brent* (y). Two questions arose in that case: one, whether the mere fact of there being a *bonâ fide* litigation in the ecclesiastical Court as to the grant of probate, is ground for the Court to interfere by injunction and receiver; and another, whether, where the executor who

(s) *Smith v. Haytwell*, Amb. 66 ;
see *S. C.* 3 Atk. 566, under the name
of *Smith v. Aykwell*.

(t) *King v. King*, 6 Ves. 172.

(u) *Rutherford v. Douglas*, 1 Sim.
& Stu. 111.

(x) 2 V. & Be. 96.

(y) 1 My. & Cr. 97.

has obtained probate, has agreed with the plaintiff instituting a suit to recall such probate, that the validity of the testamentary paper under which the executor claims shall be tried in the suit, that is such a case as to induce the Court to interfere. The first question was decided in the negative, and the second in the affirmative. The Court said, there was no doubt but that by the rule of Court, if the representation is in contest, and *no person has been constituted executor*, the Court interferes, not because of the contest, but because there is no proper person to receive the assets. But where probate has been granted, the case is otherwise; for then there has been an adjudication, and there is a person legally capable of receiving the assets. And then a strong case, as of fraud or of great danger to the property, pending the litigation, must be made out to induce the Court to interfere. In the principal case, although there had been such adjudication, the Court was of opinion there was ground to interfere, because the executor, by his agreement to let his title be disputed, had treated himself as not complete executor (2).

49. An injunction will be also granted to restrain an executor from selling the property, where he sets up a claim to it as a gift from the testatrix in her life time, and the bill impeaches the defendant's title both as executor and as donee, and is supported by affidavits of undue influence (a).

But an injunction will not be granted to restrain executors from parting with any of the assets of the testator either to creditors or legatees, at the instance of an annuitant, for his protection as to future instalments, where there is no arrear due, and no case made of past misapplication, or of probability of future misapplication. There is no default in regard to an instalment of an annuity till the day on which it becomes due; and the day before that, the

(2) *Watkins v. Brent*, 1 My. & Cr. 97.

(a) *Edmonds v. Dyer*, 1 Ves. & B. 642.

executors might lawfully apply the whole of the assets to pay simple contract creditors (*b*).

Nor will an injunction be granted at the suit of a judgment creditor against a party who is heir at law and administrator of the debtor, to restrain waste by him, unless there is an affidavit that the debt is in danger of being lost by the acts of waste being permitted (*c*), and it seems doubtful whether even on such an affidavit the Court would act.

50. A receiver appointed by the Court will be protected against acts in the nature of waste. Thus where an estate is in the possession of a receiver appointed by the Court, if another person, at the time of the appointment of the receiver, is in the exercise of a right of common over the estate, the appointment of the receiver will not interfere with his right. But if he has for several years abandoned the exercise of his alleged right, and then trespasses on the land by sending his cattle thereon, and on his cattle being impounded, replevies, and persists in the trespass, he will be restrained from turning his cattle on the land or exercising any right of common or disturbing the receiver in his possession, and from continuing the replevin action until further order, with liberty however to go in before the Master to be examined *pro interesse suo* (*d*). And in a late case, where a receiver had been appointed, in pursuance of an order of the Court, of the office of master forester of a royal forest, held under letters patent, and A. and B. possessing land in the forest sported there; and it was disputed whether the master forester had the exclusive right of sporting, or whether A. and B. had not on the contrary rights of freewarren and to kill game; Sir L. Shadwell, V. C. granted an injunction for restraining A. and B. from sporting in the forest, putting the parties on terms to pro-

(*b*) *Read v. Blunt*, 5 Sim. 567; a receiver over an heir at law, *Clarke v. Dew*, 1 Russ. & Myl. 103. see also *Hawkins v. Day*, Amb. 160.

(*c*) *Leake v. Beckett*, 1 Y. & Jerv. 339; and see a case as to appointing

(*d*) *Jones v. Claughton*, Jac. 573.

ceed at law without delay to try whether the forest was a royal forest and chase, and whether A. and B. were entitled to free warren and to kill game; and the order was affirmed by Brougham, C. (e).

51. As between partners an injunction will also be granted to restrain acts in the nature of waste. Thus a surviving partner has been restrained from disposing of the joint stock of the partnership upon a case of danger being made by the affidavit, as for instance, where the surviving partner was in prison for debt, and had refused to account and come to a final settlement, and the plaintiff swore to his information and belief that he was expending the joint stock in the maintenance of himself and family (f). But in a case in the Exchequer, where two partners agreed to dissolve, and that one (the defendant), on paying half the value of the effects, should take possession of the whole, it was held no waste in him to take possession of some land and buildings, part of the partnership property, and to commence pulling down the buildings (g). The Court said the plaintiff could only have an account of the partnership dealings for the purpose of ascertaining what was due to him under the agreement for a dissolution.

52. In *Recre v. Parkins* (h), an injunction was granted *ex parte* to restrain the treasurer of a friendly society from applying any of the funds to the payment of the annuities payable according to the rules, and from selling out the stock; the affidavits filed in support of the bill showing that the rules were framed on erroneous principles, and that in consequence, the annuities chargeable upon the funds had become so numerous as to be likely to exhaust the whole.

An *ex parte* injunction will be granted to restrain the in-

(e) *Bouchard v. Cuthbert*, 6 Sim. 155.

(f) *Coffin v. Harker*, 5 Prer. 537.

(g) 2 Jacob & W. 340, and see

(h) *Hart v. Schraer*, 8 Ves. 317. *Pease v. Piper*, 17 Ves. 1.

stallation of a presentee, where the presentation purports to have been made in pursuance of the directions of a will, and a question is shown on the face of the will whether the presentee comes within the terms of it (*i*). In the same case it was established, that the Court is not bound to sustain till the hearing an injunction granted on a *prima facie* case, because there is doubt which way the Court may decide. It is entirely matter of discretion in the Court whether on the coming in of the answer or affidavits, it will sustain the injunction or not.

53. And here it may be observed that as equity interferes to protect parties in the enjoyment of a specific chattel when the right is clear (*k*), so it will interfere by injunction to restrain the disposition of specific chattels, where the right is in dispute. As where a wife, having separate estate, purchased out of it, of her husband, certain specific chattels, such as books, paintings, statues, &c., in the names of trustees to her separate use; and a question arising between the creditors of the husband and the wife, and a verdict having been obtained by the former, the sheriff seized the specific chattels; Lord Eldon, pending further proceedings at law to try the validity of the deed of sale, sustained on terms, an injunction against the sheriff's selling the specific chattels (*l*).

54. In former times Courts of equity seem to have felt considerable difficulty in applying the doctrine of relief by injunction to cases of trespass. Thus in an early case an injunction was refused to restrain a party from pulling down a wall inclosing the plaintiff's ground, and from building on the ground so near plaintiff's house as to impede his lights, because the defendant asserted a title to the wall and ground, Lord Chancellor saying, this would

(*i*) *Potter v. Chapman*, Amb. 98.

(*l*) *Lady Arundel v. Phipps*, 10

(*k*) *Fells v. Read*, 3 Ves. 70; *Lloyd* Ves. 139.

v. Loaring, 6 Ves. 773.

be to determine the right in question (16). Again, in a case before Lord Hardwicke, where a person, who had been the agent of another, had an authority to dig earth in a brick field, it was held that continuing to dig after all his powers had been revoked, he was a mere stranger and trespasser, and therefore could not be restrained by injunction (17). And in *Mogg v. Mogg* (18) the same learned judge refused to enjoin a party having no colour and being a mere trespasser; so in another case before Lord Hardwicke (19), his Lordship held that in a case of mere trial of a right, the Court cannot interfere by injunction until the legal right has been established. But it was only held that when a party has a right to something, and it is questionable whether he has not carried the right too far, an injunction may properly be granted to stay him from doing an irreparable act until the right is ascertained. This was decided in a case before Lord Camden cited in *Mogg v. Mogg*, where the lord of a manor obtained an injunction to stay waste against tenants who had a right to cut estovers, and under colour of that right cut down a great quantity of timber. So, although in the earlier times an injunction was held not obtainable against a mere trespasser, it would be granted if there was collusion between the trespasser and a tenant liable for waste (20). This doctrine was also acted upon in a later case (21), where a tenant colluded with a stranger, suffering him to come on the land.

And as a party not liable originally to be stayed by injunction may, by collusion with one who would be liable, lose his exemption, so a party who would originally have a right to come for an injunction, may lose it by colluding with one who has none. Thus in a case where the tenant

(16) *Bateman v. Johnson*, 10 High. App. 572.

(17) 1 G. 2, Mich. Term.

(18) *Montrose v. Gilchrist*, 2 Cox, 205.

(19) Dick, 670.

(20) *Wells v. Smith*, 1 Br. C. C.

(21) *Harrison v. Worsfold*, 10 Ves. 291, n. 35.

(22) *Crookall v. Meston*, 10 Ves. 290.

for life had made a lease of coal mines, and then jointly with the remainder-man filed a bill, and moved to restrain the lessee from taking coal, alleging that the lease was made by mistake and was a forfeiture of the life estate; Lord Chancellor said, he could not hear a party coming to disaffirm his own lease, and that it was collusion to bring forward the remainder-man. If he, the remainder-man, complained, he must file his bill alone (*s*).

55. A distinction was also made at an early period in the case of mines. Thus, in the case of *Gibson v. Smith* (*t*), an injunction was granted to restrain a party from committing waste by opening mines, although he claimed a right to do it. And a rather singular case is to be found in *Ridgeway* (*u*), in which an injunction was granted before answer to restrain a person who was merely the servant of the plaintiff, having no interest, from committing waste by carrying off the utensils and materials of a manufactory confided to his care; but it was said, that if he had had an interest, the injunction would not be granted before answer. It seems very difficult to reconcile this case with the authorities on the subject of waste or trespass in the nature of waste; as there was no privity to make it waste, and no destruction to make it trespass in the nature of destructive waste. Probably circumstances of importance are omitted in the report.

56. Notwithstanding his own previous decisions, Lord Thurlow however at length, in *Flamang's case* (*x*), extended by his reasoning the doctrine of injunctions in certain cases of trespass; and may be said to have laid the foundation of the modern doctrine on the subject. *Flamang's case* was this: the plaintiff, who was the proprietor of two adjoining

(*s*) *Wentworth v. Turner*, 3 Ves. 3. 252.

(*t*) 2 Atk. 182.

(*x*) *Vide* 7 Ves. 308; and 6 Ves.

(*u*) *Lord Orrery v. Newton*, Ridg. 147.

closes, under which were mines, desired one of them to the defendant, who opened a mine in the close allotted to him, and dug also in the other close, which was mere trespass. Lord Thurlow, after much hesitation, granted an injunction as to both closes; first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, on the principle of equity adjoining in matters of trespass, where irreparable damage is the consequence. This principle has been since constantly applied to trespass in mines; thus in a case before Lord Eldon, where one having begun to get coal in his own ground worked into the mine of another, an injunction was granted (y).

Again in *Lord Lonsdale v. Curwen* (z), Lord Lonsdale was owner of certain mines lying under lands called the Glosoks, and Curwen was owner of other mines situate under adjoining lands. Curwen worked under the Glosoks. An injunction was granted to restrain Curwen from getting coal under Lord Lonsdale's premises, and particularly from *robbing or taking away* certain supporting pillars. And in another case (a), which was of a precisely similar nature, the same order was made. It must be observed however that if on a motion for an injunction to stay waste by digging mines, it appears that the defendant claims a right to the inheritance of the estate where the mines are dug, the Court will not grant an injunction till the answer or default (b).

The principle as to trespass seems to be this: that although the jurisdiction of equity does not properly extend to cases of trespass, strictly so called, yet where the trespass is of such a nature as to be actually taking away or destroying the very substance of the estate, as in the case of timber, coals, lead ore, there the injunction will be granted to restrain such species of trespass (c). This doc-

(y) *Mitchell v. Duns*, 6 Ves. 147.

(z) 3 Bliſh's App. Cases, 162, *supra*.

(a) *Walker v. Fletcher*, 3 Bliſh's App. Cas. 172.

(b) *Lawler v. Sampson*, 3 Atk. 496.

(c) Vide *Hobson v. Lord Byron*, 1 Er. C. C. 585, and same case commented upon in *Hobson v. Gordon*, 7 Ves. 260; see also *Cumby v. Henchard*, 15 Ves. 130.

trine has been extended to a case of a party taking stone from a quarry, and for other purposes than that for which he has a right to take it (*d*). In the case referred to, the plaintiff was seised of an estate in which there was a stone quarry, &c. The defendant having a contiguous estate, consisting of *Newton Farm* among other lands, had, as owner of that farm, a right to take from the plaintiff's quarry for building and other purposes upon *Newton Farm*; and he took the stone to a considerable amount for the purpose of using it upon other parts of his estate. On a bill filed against him for an injunction, he demurred on the ground that this was mere trespass, and Lord Eldon admitted that it was trespass and not waste. But he held notwithstanding that the Court would interfere where such trespass would have the effect of destruction in taking the substance of the inheritance, and that, whether the trespass was under the colour of another's right actually existing or not. "If this protection," said his Lordship, "would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry?" The demurrer was accordingly overruled. Again, where the lord of a manor extending into the sea, and his lessees were the plaintiffs; and it appeared that at the bottom of the sea, as well as on the shore within the manor, were found certain stones very valuable for making a particular cement; the defendants, who were strangers and therefore mere trespassers, dredged from the bottom of the sea, within the limits of the manor, large quantities of these stones: this, in the opinion of the Court, involved irremediable mischief, and accordingly an injunction was granted (*e*). So, as already observed (*f*), an injunction against the lord of a manor to restrain him from digging coals on the copyhold estate of the plaintiff situate within the manor will be sustained, pending a trial to ascertain whether the lord had such right (*g*). And on the

(*d*) *Thomas v. Oakley*, 18 Ves. 184.

(*f*) *Ante*, s. 42.

(*e*) *Earl Cowper v. Baker*, 17 Ves.

(*g*) *Grey v. Duke of Northumberland*, 17 Ves. 281.

same principle, where a landholder has granted houses, reserving to himself the right of laying, making, and granting roads, waggon ways, &c. for particular purposes, and a question arises whether that reservation entitles him to grant such way-leaves for the purpose of an ordinary railway for general traffic as well as for the particular purpose mentioned, the Court will restrain, pending the trial of that legal question, the grantors of the landholder's reserved right of making a way, from breaching unimproved ground, and cutting up ancient pasture, and otherwise destroying the surface of the land (b).

57. But in such cases, where, from the nature of the circumstances, very great mischief may result to the defendant, from the injunction being held up too long, the interposition of the Court must be with considerable pressure, that on the part of the plaintiff there shall be no delay in going to trial; and unless some means of procuring a speedy trial are insured, the Court will not sustain the injunction. And where a defendant, who claimed as lord of the manor, was removing earth and stones from under a bank, which belonged to the plaintiff, and which he swore was the only protection to his land against inroads of the sea, an injunction was granted *ex parte*, on the ground of the irreparable injury; but would not have been granted if the plaintiff had not already by an action established his right at law (i).

58. But where there is no case made of *irreparable danger*, or no ground for the principle applicable to the special case of mines, an injunction will not be granted to stay trespass in the nature of waste, that is, acts of waste, where the defendant sets up an adverse title (k); nor,

(b) *Farrow v. Fensholt*, 1 Rail-
way Cas. 602.

(i) *Chall v. Watt*, 3 Mer. 608.

(k) *Kirke v. Jones*, 17 Ves. 110,
and *Smith v. College*, 8 Ves. 890.

Henson v. Gifford, 7 Ves. 335; and
see per Lord Eldon in *Norton v.*
Rose, 19 Ves. 147; *Pittman v.*
Horton, 6 Ves. 51.

indeed, without any such adverse claim in the defendant, where the plaintiff does not offer positive evidence of his own title ; as, for instance, where the affidavit of the plaintiff in support of his bill is sworn only as to information and belief of the fact on which his title rests. It must be irreparable mischief to a person who swears to his title (*l*).

59. That the rule, however, remains unchanged as to mere trespass, and that the exception will not be carried further than it has already gone, appears by a very late case (*m*). There A., the plaintiff, was mortgagee in receipt of the rents of an estate in Wales ; and the defendants B. and other parties owners of adjacent iron works, desiring to construct an iron tram-road from their works to another place, and finding it convenient to cross the mortgaged estate, obtained permission of C., the tenant in possession of A., by a false representation that they had A.'s consent ; and accordingly laid down a tram-road through the estate, in making and keeping up which, as it was alleged, they did much damage to the estate. A., living at a distance, had no notice of the circumstance for three years ; but as soon as he had notice of the existence of the tram-road, he proceeded to have it taken up. The workmen of the defendants forcibly interrupted the plaintiff's workmen in this, whereupon he filed his bill, among other things, for an injunction, to restrain the defendants from using the tram-road they had made, and from interrupting the plaintiff and his workmen, &c.

The defendants demurred, and the demurrer was allowed. Lord Cottenham, C. said, in giving judgment, " the thing here complained of has been done. The tram-road has, with the leave of the tenant in possession, been completed, and the Court is asked by the bill to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing

(*l*) *Davies v. Leo*, 6 Ves. 784.

(*m*) *Deere v. Guest*, 1 My. & Cr. 516.

to to use it, and from interrupting the servants and workmen of the plaintiffs in their attempts to destroy it. In other words, the Court is virtually asked to eject the defendants, and authorize the plaintiffs themselves to take possession of the trans-road. The case originally may have been a case of waste; waste occasioned by the cutting of the trans-road, and laying of the iron rails over the plaintiffs' land; but what is now claimed by the defendants is simply a right of way, and if they are not entitled to that right they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such. The *dicta* of Lord Eldon in *Norway v. Race* (a) have no application to a state of circumstances like the present. The case there referred to by his Lordship, was a case of waste committed by a stranger colluding with the tenant, a case in which the landlord would have a right against the tenant, and therefore against a person who claimed through the tenant."

60. On the principle, that equity will not relieve against mere trespass, an injunction will not be granted at the suit of a devisee, to restrain the heir at law, who disputes the will, from cutting timber; because the denial of the title of the devisees, and the assertion of the title as heir, make him, if he has no right, a mere trespasser (c). So it seems by several *dicta*, that where a bill is filed by the heir against the devisee in possession to stay waste, and the answer states the will to have been duly executed, the heir cannot have an injunction (p). And the interference of the Court would undoubtedly be refused, if the party applying did not show that he was proceeding to bring the legal question to an issue with all expedition. Thus where the bill by the heir at law against the devisee, was not filed till two years and a half after the testator's death, and no action had then been brought, whilst the acts of

(a) 39 Ves. 154.

See 3 Mer. 173.

(c) *Stanh v. Collyer*, 8 Ves. 49.
Parker v. Barry, 2 Mol 541, and

(p) 10 Ves. 155, and see 3 Mer.

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waste and destruction complained of, were committed soon after the testator's death, an injunction was refused (*q*).

So, where a will comprises personalty as well as realty, the Court will not, at the suit of the heir at law, disputing the will, restrain the executors from interfering with the personal estate, unless there is a suit depending, in the result of which it may appear that the will may be set aside. For if the will stands, the heir is a perfect stranger to the personal estate, and he has no title, unless he alleges that a question as to the validity of the will, as a will of personal estate, is either depending or about to be raised, to ask for an injunction or receiver against the executors (*r*).

In a case of *Fingal v. Blake* (*s*), however, the doctrine of these cases was denied. The motion was for an injunction at the suit of a devisee against the heir at law, who disputed the will, and it was at first refused by the Master of the Rolls, and that order was affirmed by Lord Chancellor Manners (*t*); but on rehearing, it appears that Lord Chancellor Hart reversed the former order, and granted the injunction (*u*), saying, "he had long doubted the soundness of the old decisions with respect to waste; that the Court had jurisdiction to restrain waste by an heir at law disputing the will, and he would do so at any time on motion." His Lordship cited no authority for this position, and whether the opposite practice be harsh or not against the devisee, it seems too well settled by authority to be shaken, at least as a general rule, by one contrary decision.

A curious case of waste, which seems to partake of the nature of trespass, is mentioned in *Cary* (*v*), where the plaintiff's and defendant's houses adjoined, and the partition wall stood partly on the plaintiff's and partly on the defendant's freehold; and the defendant was restrained from pulling down the wall, to the overthrow of the plaintiff's garret, which was over the defendant's kitchen.

(*q*) *Jones v. Jones*, 3 Mer. 161.

(*r*) *Ibid.*

(*s*) 2 Mol. 542, 50.

(*t*) See 2 Mol. 543.

(*u*) *Ibid.* 60.

(*v*) Page 90.

61. The principle that equity will relieve against or refuse to assist the legal right of a person who stands-by and acquiesces in the infringement of that right, and then comes to claim it, is applied to cases of waste as well as to other cases. Thus, where the assignee of a lease, whose landlord having reserved by the lease all trees and timber-like trees, &c. was permitted by the landlord to lay out a considerable portion of the premises for a pleasure ground, at great expense, the landlord assenting by himself and by his surveyor in cutting trees for the purpose; the landlord was restrained from cutting trees in such pleasure ground during the remainder of the term (1). So in an earlier case of *Brydges v. Kilburne* (2), in which a lessee having altered a logwood mill into a cotton mill, on application was made for an injunction, it was refused, on the ground that the plaintiff had stood by and seen the cotton mill erected. And in a very late case (3), Lord Bringham, without deciding on the merits, refused an injunction against waste, on the ground of acquiescence. Again, where a canal company having applied the water drawn from some exhausted coal mines to the supply of their reservoirs, the proprietor of neighbouring coal mines gave them notice of his intention to open an old level, for the purpose of draining those mines, preparatory to working his own mines; and the company, instead of applying immediately (although they had threatened an action), suffered the other party to go on for two years, at an expense of 2000*l.*, till he was just ready to work his mines, and then came for an injunction; Lord Eldon refused it, on the mere ground of laches, and left the plaintiffs to try their right at law (4). This principle will also be found to have been of frequent application in cases arising on the proceedings of railway companies (5).

(1) *Jackson v. Cater*, 5 Ves. 606. 622.

(2) Cited in *Jackson v. Cater*, 5 Ves. 606, 621.

(3) *Pearce v. Poole*, 3 My. & K.

(4) *Birmingham Canal Company v. Frost*, 18 Ves. 512.

(5) See Chap. II. post.

CHAPTER II.

Injunctions to restrain Infringement of Copyright.

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| <ol style="list-style-type: none"> 1. <i>Ground of the Jurisdiction.</i> 2. <i>Plaintiff must shew primâ facie Title.</i> 3. <i>Where even primâ facie Title, Right may be repelled by Nature of Work.</i> 4. <i>Mawman v. Tegg.</i> 5. <i>Doctrine as to fair Use of preceding Publication.</i> 6. <i>Doctrine as to Effect of Quantity, in Cases of alleged Piracy.</i> 7. <i>As to bonâ fide Abridgment.</i> 8. <i>Bonâ fide Additions will be protected.</i> 9. <i>Doctrine as to Books of the Class of Road Books, Calendars, and the like.</i> 10. <i>How Piracy judicially detected.</i> 11. <i>Effect of putting forth a Work as the Work of another.</i> 12. <i>Rule as to necessary Allegation of Piracy, where the Works are of voluminous Character.</i> | <ol style="list-style-type: none"> 13. <i>Injunctions to restrain Publication of Letters.</i> 14. <i>General Result of the Authorities.</i> 15. <i>Injunctions to restrain Publication of unpublished MSS.</i> 16. <i>Privileged Publications.</i> 17. <i>Where Question is, whether the Plaintiff is the Person having Title.</i> 18. <i>Piracy of Lectures.</i> 19. <i>Stat. 5 & 6 Will. 4, c. 65.</i> 20. <i>Copyright in Translations, and Copies of Specifications of Patents.</i> 21. <i>Injunctions to restrain copying Engravings, &c.</i> 22. <i>Foreign Copyright.</i> 23. <i>Question as to Copyright of a Foreigner; and of an English Subject obtaining the Copy from a Foreigner and publishing here.</i> 24. <i>Stat. 1 & 2 Vict. c. 59. International Copyright.</i> 25. <i>Other Cases of Injunctions in Matters of Copyright.</i> |
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1. THE jurisdiction of equity in matters of copyright is founded upon this, that the law does not give a complete remedy to those whose literary property is invaded; the Court of Chancery, therefore, interposes by injunction(a).

The Court exercises its jurisdiction, not for the purpose of acting upon legal rights, but either on the assumption

(a) Jac. 314, 472.

that there is a legal right, for the purpose of better enforcing it; or, in a case of doubt whether the legal right exists or not, for the purpose of preventing mischief until it has been ascertained; the office of the Court being consequent upon the legal right (*b*). But the jurisdiction of the Court to relieve by injunction is not taken away, because an act of parliament provides a remedy by special action on the case (*c*).

2. In general, equity requires a plaintiff, who comes to claim its interference for the protection of copyright, to show a *prima facie* legal title (*d*).

This is done, if the author is himself the plaintiff, by an affidavit of the fact that he is the author of the book. If the plaintiff is an assignee, as an assignment of copyright should be regularly in writing (*e*), the title must be shown in general by proving such assignment. The plaintiff, if an assignee, must swear to a particular title; it is not enough to say he has purchased or legally acquired the copy; for as no one but the author or the assignee of the author has title under the statute, he must swear that he purchased it of the author (*f*), or of his assignee (*g*). But when he claims as assignee of an assignee, he will not be put to produce the original assignment to his assignor. Thus in *Morris v. Kelly*, an injunction was granted to restrain the defendant from performing a comedy, the copyright of which had been originally sold by the author to the proprietors of the Haymarket theatre, and by them assigned by writing to the plaintiff. Although the plaintiff was unable to show whether the original assignment by the author had been in writing or not, Lord Eldon threw the proof of want of title on the defendants.

(b) 3 Myl. & Cr. 726.

(c) *Sheriff v. Carter*, 1 Har. & My. 159.

(d) See however on the question, some of the rule, *post*, p. 196.

(e) *Emser v. Walker*, 3 Myl. & Cr. 7.

(f) *Gilliver v. Sargent*, 2 Eq. Ab. 522; 1 Ves. Ab. 276. A. 4.

(g) *Morris v. Kelly*, 1 Har. & W. 401.

Where the plaintiff does not show a *primâ facie* title, the Court will generally refuse to interfere till the right has been tried and determined at law. Thus in a case of *Platt v. Button* (*h*), the plaintiff claimed by his bill the music of certain dances as his property, but he did not file with the bill any affidavit of title, and it appeared that he had permitted several people to publish these dances, some of them for fifteen years. Under these circumstances Lord Eldon refused to interfere before the legal right had been determined at law.

And though a title by assignment must be by writing, yet a parol licence by an author, followed by long acquiescence, may so far give the licentiate a *quasi* right, as to prevent the Court from restraining him at the suit of the author. In *Rundell v. Murray* (*i*), the plaintiff had made a free gift by parol of her MS. to the defendant, without any limitation as to time, and fourteen years after, finding that he made considerable profit by it, she sought to restrain him from continuing the publication; but Lord Eldon refused the injunction, holding, that without saying in whom the copyright was, the conduct of the plaintiff was such as to amount to a licence to the defendant, without defining a limit, and he would leave the parties to law.

3. Though in general the author or his assignee has a *primâ facie* legal title sufficient to support an application for an injunction, yet the work may be such, that for reasons of morality or public policy, no action at law could be maintained upon it. Such is the case where a work is of a grossly immoral tendency; or irreligious; denying or throwing doubt on the doctrines of the Christian religion; and in these cases the work would not be protected at law (*k*). The doctrine of equity in reference to works of this character is, that if an author can

(*h*) 19 Ves. 447.

(*i*) Jac. 311.

(*k*) See 2 Mer. 439, as to the doctrine laid down at law by Eyre, C.

J.; see also *Hime v. Dale* on this point, 2 Camp. 31, *notis*, per Lord Ellenborough.

maintain an action, he may at least, with some exceptions, come into equity to have his remedy made more effectual. But if the action could not be maintained, nothing can be done in equity, which is only auxiliary to the law, and therefore will not give relief except where the law gives damages. (1)

In *Walcutt v. Walker*, Lord Eldon approved the doctrine of Lord C. J. Lyne, referred to above, that publications may be of such a nature as that the author can maintain no action at law, and laid down the doctrine, that when that is the case, equity will not interfere. In that case the injunction was to restrain publication of two editions of the plaintiff's work, there being a dispute between the plaintiff and defendant as to the effect of their agreement. As to one edition, the defendants admitted they had published matter which they were not authorized to publish. Lord Eldon refused to sustain the injunction on either edition; as to that in regard to which the defendants submitted, his Lordship said it was not the duty of the Court to grant an injunction, even on the submission of the defendant, if it appeared doubtful whether the plaintiff could maintain an action at law. "Before," he said, "I uphold any injunction, I will see these publications, and determine upon the nature of them, whether there is question enough to send to law as to the property of these copies; for if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act on the submission in the answer; if criminal, I will not act at all; and if doubtful, I will send that question to law."

In *Lawrence v. Smith (m)*, Lord Eldon, having formed an opinion that the work in some parts impugned the doctrine of the immortality of the soul, and the truth of the scriptures, or rather, having entertained a doubt whether it did not do so; and doubting whether a work thus constructed would be held entitled to protection at law, refused to assist such doubtful right by injunction. "The

(1) Jac. 472; and *Walcutt v. Walker*, 7 Ves. 1.

(m) Jac. 471.

plaintiff," said his Lordship, "may bring an action, and when that is decided he may apply again." So in *Murray v. Benbow*(*n*), and in another case, the protection by injunction was refused in support of a publication, the tendency of which appeared to the Court such that it was doubtful whether in law there would be copyright. This doctrine will be acted upon, even although the case should be that the author has never published the work, and that he wishes to restrain the publication, because of the impropriety of it, and of the personal injury which he would suffer by its publication; the Court would still refuse to interfere in such a case, because it has nothing to do with the punishment or prevention of injuries to personal character, but only with the protection of the legal title of the author. In a case, therefore, where the Court had doubts whether a work was of an innocent character in the sense of supporting an action for damages, and where besides it appeared that the author had left the manuscript in the hands of a publisher for twenty-three years, without inquiring what had become of it, the Court refused, upon these grounds, and as it would seem without considering it necessary to determine positively whether the work was or was not an innocent one, to restrain the publication until the author had established his right at law(*o*).

And where a publisher advertises the publication of a work in the name or as the work of a person who is abroad, an injunction will be granted to restrain such publication, if the defendant refuses to swear to his belief that the work is composed by that particular person, and that person's agents swear to their belief that it is not his work, and to circumstances shewing strong probability that it is not(*p*).

4. The case of *Mawman v. Tegg*, which was the subject of great discussion before Lord Eldon, specifically decides only two points: first, that it is not an inflexible rule of

(*n*) Cited *ibid.* 474, *notis*.

(*p*) *Byron v. Johnstone*, 2 Mer.

(*o*) *Southey v. Sherwood*, 2 Mer. 29.

equity, that the plaintiff in an injunction bill against piracy of his copyright must show a legal title; but that if he shows a clear equitable title, equity will interfere, although his legal title may not be clearly complete; secondly, that as between works of compilation, such as Encyclopaedias, Dictionaries, and the like, it is material to ascertain what quantity has been pirated; not for the purpose of determining whether an injunction shall go at all, but whether an injunction shall go against the whole work, or only against so much as has been pirated. In the course of his judgment, however, Lord Eldon let fall some important observations concerning the law of the Court as to works of this class. It may be collected, that where the Court sees that the piratical part is such, that, being removed, it would destroy the whole, an injunction may be granted against the whole: but that the Court will seldom, if ever, grant an injunction against the whole work, without having first ascertained by its own inspection, or otherwise, the quantity of matter pirated. That where only a few pirated passages occur, there may be much doubt whether the Court will exercise its jurisdiction, or would not rather leave the complaining party to his action at law. That the best evidence in the absence of positive averment of piratical copying, is the circumstance of the blunders of the original book being transferred into the book which is accused of piracy; and that when a considerable number of passages are proved to have been copied, by the copying of the blunders in them, passages, if found to be the same with other passages in the original book, must be presumed *prima facie* to be likewise copied, though no blunders occur in them. These are only extra judicial *dicta*, it is true, but they afford nevertheless important principles regarding questions of piracy, in a class of works, in which it is obvious that each case must be decided, to a considerable extent, upon its own circumstances (*q*).

It was intimated also in *Mawman v. Tegg* that where

(*q*) *Mawman v. Tegg*, 2 Russ. 385.

the plaintiff has an equitable title, and it is necessary to send the case to law to try the question of piracy, the defendant will be put on terms to admit in the action, for the purposes of the action, the legal copyright of the plaintiff; and this may be considered as now the settled practice (s).

5. In *Wilkins v. Aikin* (t), the doctrine as to what constitutes a fair use of a preceding publication was much discussed. The plaintiff had published a work on the Antiquities of Greece, containing many plates, and the defendant published a treatise on the Doric Order of Architecture, in which he introduced some parts of the plaintiff's work; but the greater part of the defendant's work was compiled by himself from materials common to both authors. Lord Eldon treated it as not a case for dissolving or sustaining an injunction *simpliciter*; but allowed the defendant to go on, keeping an account, an action to be brought forthwith.

The principle on which the Court acts in aiding copyright by injunction was thus stated by the Lord Chancellor (u), "the jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by an action for damages, as if the work is pirated it is impossible to lay before a jury the whole evidence as to all the publications which go out to the world to the plaintiff's prejudice. A Court of equity acts, therefore, to make the legal right effectual, by preventing the publication altogether; and accordingly, in the exercise of this jurisdiction, where a fair doubt appears as to the plaintiff's legal right, the Court *always* directs it to be tried, making some provision in the *interim*, the best that can be for the benefit of both parties."

In *Saunders v. Smith* (x), the defendant had composed a

(s) *Sweet v. Shaw*, 17 Law Journ. 216; S. C. 3 Jurist, 217; *Sweet v. Cater and others*, 5 Jurist, 68.

(t) 17 Ves. 422.

(u) *Per* Lord Eldon, *ibid.*, 424.

(x) 3 My. & Cr. 711.

work in which he had taken certain cases at full length from Reports covered by the copyright of the plaintiff, and had commented upon them in copious notes. The notes forming not merely the most laborious part of the book, but in fact its chief and intrinsic value. The plaintiff, it appeared, knowing that the defendant had published one volume of this character, and being made aware that he was preparing a second, permitted him to go on until the first part of the second volume was published. Under these circumstances the Lord Chancellor held, that without deciding whether or no the defendant had a legal title to do what he had done, it was not a case for the interposition of equity by injunction, until the plaintiff should have established their title at law.

In *Bramwell v. Hulcomb* (y), the question was raised whether the defendant had fairly made extracts from the plaintiff's work, or whether he had taken so large a quantity as to infringe on the plaintiff's copyright; but Lord Cottenham, C., repudiated the doctrine that quantity could be an element of decision. "When it comes to a question of quantity," said his Lordship, "it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is looked to. It is useless to refer to any particular cases as to quantity." His Lordship expressed an opinion that an injunction could not be sustained; but the case went off without a final decision on the point.

6. But although in cases of infringement of copyright, the quantity taken is not generally to be made the standard by which to determine when there is piracy or not, yet there are cases in which the smallness of the quantity taken is of importance in deciding the question of piracy. Thus in a case before Sir Thomas Plumer, M. R., in which the work alleged to be pirated was a play, extending

over forty pages, and the defendant published a journal of theatrical criticism, in which, as illustrative of his critical remarks, he had introduced broken and detached fragments of the piece in question, amounting in the whole to six or seven pages, some weight appears to have been allowed to the circumstance by the Court, as affording ground for doubt whether the defendant had transgressed the limits of fair quotation. Whether he had actually transgressed those limits the Court was not called upon to decide, because the plaintiff having brought the cause to a hearing for the purpose of obtaining a perpetual injunction, and the injury, as it appeared, being altogether trivial, the Court dismissed the bill with costs, principally on the ground, that to sustain an injunction at the hearing, there must be nothing like doubt in the case (*a*).

But quantity may be connected with, or influence the value of the extract taken from a work, and consequently may indirectly affect the injury done to the plaintiff; and therefore it may, under particular circumstances, form an element in the decision of the Court as to granting or withholding an injunction; this appears by a late case, in which the Lord Chancellor thought that if there were no other ground, the small value attributable to extracts from the plaintiff's work, was sufficient to justify him in withholding an injunction (*b*). And from the report of the case it may be collected, that the question of value depended in some measure on the quantity pirated.

7. An injunction will not be granted to restrain a fair *bonâ fide* abridgment of a larger work (*c*). What constitutes a fair abridgment it is not always easy to determine. Where passages read from each work in a biographical composition show that the facts and even the terms in which they are related in the alleged abridgment are frequently taken

(*a*) *Whittingham v. Wooley*, 2 Swans. 428.

(*b*) *Bell v. Whitehead*, 17 Law Journ. 141.

(*c*) 1 Brown, 450; and see *Giles v. Wilcox*, 2 Atk. 143, per Lord Hardwicke.

verbatim from the original work, an *ex parte* injunction will be granted till answer or further order; and the question whether it is a fair abridgment or a piracy will be referred to the Master (*d*).

In the case of *Giles v. Wilton* (*e*), the defendant had copied Sir M. Hale's *Pleas of the Crown*; only some old statutes were left out, and the Latin and French quotations were translated into English; the question was, whether that was a fair abridgment. The Court seems to have inclined to consider it colourable, but it was referred to arbitration.

8. Indeed equity will consider *bonâ fide* additions so far property as to be entitled to protection by injunction. Thus the piratical publication of original notes to a work which of itself is public property will be restrained; and that, although there is a small admixture of new notes among the pirated notes; and it is no defence to say that the plaintiff has published the notes of other authors without having a right to them (*f*).

However, where the owner of the copyright of a work, consisting of narrative and reflections, has himself published large extracts or an abstract of his work in a periodical, other parties who have subsequently done so, and that by taking only the narrative and leaving out all the reflections, not printing on the whole more than one-tenth of the work, will not be restrained (*g*). The Court appears to have been much influenced by the consideration that the plaintiff having already done precisely the same thing himself, could not be much injured. But where a play has not been published by the author, who obtains his remuneration by permitting it to be played, a person pirating the words of it by means of a reporter, and publishing not an abridg-

(*d*) *Bell v. Walker*, 1 Brown, C.C. 450.

(*e*) 2 Atk. 141.

(*f*) *Town v. Walker*, 3 Swanst. 672.

(*g*) *Dodsley v. Kinnersley*, Amb. 403.

ment or abstract of the whole, but an entirety of a part, such as one whole act, will be restrained (*h*).

9. The general doctrine on copyright in publications of the class of maps, road books, calendars, chronological and other tables, and such things, is not very easily reducible to any accurate definition. Some of the cases lay it down that, properly speaking, there can be no copyright in such works. "All human events," says Lord Erskine, in *Matthewson v. Stockdale* (*i*), "are equally open to all who wish to add to or improve the materials already collected by others making an original work. No man can monopolize such a subject." And in an earlier case, Lord Thurlow had said as to road books and such works, that the subject matter is *in medio*; roads are open to the inspection and observation of all mankind, and every one is at liberty to publish the result of such observation (*k*). On the other hand, in *Longman v. Winchester* (*l*), which was a case upon a calendar, Lord Eldon said he could not go the length of stating the proposition that there could not be copyright in a work of that description.

But whatever may be the true doctrine on this point, there is at any rate a right recognised and protected by the Courts to this extent; that though every man has an undoubted right to compile a literary work from those sources which, whether in nature, or in other books not subject to copyright, are public property, open to all; yet if one man has with mental labour compiled such a work, another man shall not copy from that work (*m*).

In *Longman v. Winchester*, Lord Eldon thus expressed the doctrine; "take the instance of a map describing a particular county, and a map of the same county afterwards published by another person; if the description is accurate in both, they must be pretty much the same. But it

(*h*) *Macklin v. Richardson*, Amb. 694.

(*i*) 12 Ves. 273.

(*k*) *Carnan v. Bowles*, 1 Cox, 283.

(*l*) 16 Ves. 269.

(*m*) *Cary v. Longman*, 1 East, 358; *Cary v. Faden*, 5 Ves. 24; *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Ves. 269.

is clear, the latter publisher cannot on that account be justified in sparing himself the labour and expense of an actual survey, and copying the map previously published by another. So as to Patterson's Road Book, it is certainly competent to any other man to publish a book of roads; and if the same skill, intelligence and diligence are applied in the second instance, the public would receive nearly the same information from both works. But there is no doubt that this Court would interfere to prevent a mere republication of a work, which the labour and skill of another person had supplied to the world."

And in the case of *Craun v. Bowles*, already referred to, where the question was as to the similarity of two road books, one of which gave a description of all the roads of Great Britain by letter-press, and the other in great part by maps; Lord Thurlow said, the question would be whether the author (of the first) had exhibited any new and distinct idea in the exposition of the roads; and then whether the subsequent editor had in substance adopted the same. In cases of this class of road books, maps, &c., the question whether there is piracy or not must, of course, vary in almost every case; but the general rule applicable to other copyright cases prevails, that the plaintiff must show a *prima facie* title. Thus where A. published a road book, in which he had taken the plan and much of the materials of an earlier work of the same kind, and then filed his bill, and moved for an injunction against B., who had published a road book, taking much of A.'s matter, the Lord Chancellor made no order, saying, "if he did strict justice, he should order B. to take out of his book all he had taken from A., and, reciprocally, A. to take out of his book all he had taken from the earlier work (n)."

10. The fact of copy or no copy is generally ascertained, in the absence of direct evidence, by the appearance in the alleged copy of the same inaccuracies or blunders that are

(*) *Cary v. Faden*, 5 Ves. 24.

to be found in the first published work (o). It may be questioned whether this is a perfectly sound principle; it is quite possible, that in copying the same original, two persons may have made the same errors; and that, because such errors may arise, not from any inherent disposition to a particular error in the mind of either author, but from a combination of circumstances appertaining to the original, tending to induce a particular kind of error in any ordinary mind, applying itself to the observation of that original.

Other circumstances may, however, also afford inferences of servile imitation: thus, in *Matthewson v. Stockdale* (p), where the ground of the work was a catalogue of names, appointments, and such other information constituting the East India Calendar, great similarity in long lists of casualties, removals, and deaths, even as regarded the position in the page, was considered of weight; and the Court, in reference to such a work, laid some stress on the price of the defendant's work being much lower, as affording an inference that it must have been copied; "the defendant," said the Lord Chancellor, "thinking the plaintiff's work imperfect, and capable of improvement, the natural inference is, that his work would be more expensive; but he publishes at less."

11. Where a person collects accounts of natural curiosities and such articles, and employs the labour of his mind in giving an accurate account of them, that, it seems to have been the opinion of Lord Eldon, is as much a literary work as many others that are protected by injunction and action; and where one person has published such a work, although it is equally competent to another to produce a similar one, provided it be *bonâ fide* his own, and put forth as his own original work, yet he will be restrained from putting it forth to the world, in such a manner as to lead the public to infer that it is the work of the other. Thus

(o) *Longman v. Winchester*, 16 Ves. 269; see also *Mawman v. Tegg*, cited *ante*, p. 195.

(p) 12 Ves. 270.

in *Hogg v. Kirby*, where Kirby published for Hogg a periodical work of this nature, and then differences having arisen, announced and published a new work, as "a new series improved," and with such contrivances as to the cover, &c., that it would be impossible, without reading the two, to find out that they were different, and so that the Court was satisfied the defendant had represented his work to be the same as the plaintiff's, an injunction was granted, specially worded, so as to operate only against the publication handed out to the world as the continuation of the plaintiff's; the plaintiff being put on terms to bring an action, and the defendant to plead without delay (q).

12. In *Lewis v. Fullarton* (r), Lord Langdale, M. R., elaborately discussed the question, what order should be made in a case of conflicting works of compilation and of a very voluminous character. The plaintiff's work was a topographical dictionary, and the defendant's was the same; and the Court came to the conclusion, on examination of a great number of passages, that the defendant had extensively made use, not of the original sources, but of the plaintiff's work; and that in a large proportion of the defendant's work no other labour had been applied than in copying the plaintiff's, and arranging the matter in the form which best suited the defendant's purpose. His Lordship was clearly of opinion, that the defendant's work was, to a considerable extent, a piracy; but then it contained many original passages, as to which his Lordship said, if they had stood alone, no injunction could have gone; and the difficulty was, as in *Mawman v. Tegg*, whether to grant an injunction against the whole work on the evidence of the piracy existing as to a large portion, or whether to ascertain first all the piratical parts, and to enjoin specifically as to those parts. The order ultimately determined on was, that the defendant should be restrained from publishing, &c. any copies of a book called "A New and Comprehensive

(q) *Hogg v. Kirby*, 8 Ves. 215.

(r) 2 Beav. 6.

Gazetteer" (this was the title of the defendant's book), *containing any article or articles, passage or passages, copied, taken, or colourably altered, from a book called the "Topographical Dictionary of England," published by the plaintiff.*

In a later case of *Sweet v. Maugham* (t), which arose on an alleged piracy of a periodical devoted to reports of law cases, the same sort of point arose; it was objected in that case, that the plaintiff did not specifically point out what were the articles in which he claimed copyright; but the Court held that was not necessary, as in voluminous works the practice is to point out some specific acts of piracy, as evidence of infringement, and then, if the injunction is granted at all, it is granted generally. In this case, the order closely followed the order in *Lewis v. Fullarton*. The defendants were restrained from publishing any copies of their own publications, *containing reports of cases copied from reports of cases published by the plaintiff*. It is plain that this form of order rather eludes than meets the difficulty; for in effect, it leaves to be decided, on a subsequent motion for breach of the injunction, what specific parts of the defendant's work he may, and what he may not publish.

The general course in such cases of alleged piracy is this: if the Court sees strong ground for supposing that the defendant's work is a colourable imitation of the plaintiff's, an injunction *ex parte* will be granted till answer or further order; and then on motion to dissolve, if the Court has doubts, it will, in order to ascertain the fact of piracy or no piracy, either refer it to the Master to examine into the originality of the new book (u), or inspect the two works itself (x). The former course is pursued, where the works are long and of a complex character, con-

(t) 9 Law Journ. N. S. 323; 4 Jurist, 479.

Br. C. C. 451; — v. *Leadbitter*, 4 Ves. 681.

(u) *Carnan v. Bowles*, 2 Br. C. C. 80; 1 Cox, 283; *Bell v. Walker*, 1

(x) *Butterworth v. Robinson*, 5 Ves. 709.

taining much that is common property, and some original matter; as when the works in question consisted partly of selections from histories and tours through a particular province, and partly of observations (*y*); in the contrary, the latter course will be adopted, where the works are of a class affording facility for the detection of piracy by immediate inspection (*z*); and in such a case an injunction will be granted on certificate of bill filed (*a*).

When the two books have been fully examined by the Master, and he reports that they are in parts different and in parts the same, an injunction will be granted to restrain the publication of the second work as to the parts that are similar to those of the first (*b*). But where the Master reported that the books were not the same books, and that they differed in this, that one was a description of roads by letterpress, and the other a description of the greater part by maps, and of the remainder by letterpress, but the roads were in substance the same; the Court referred it back to the Master, to inquire whether the alleged piratical work was a *new and original* work (*c*).

Where the piracy is plain, an injunction will be granted to restrain the publication of any work or works in which the matter of the plaintiff's publication, or any part thereof, is *verbally or substantially* introduced (*d*).

13. As to the jurisdiction of equity to restrain the publication of letters, there has been considerable discussion, and some refined distinctions have been taken. In a case of *Pope v. Curl* (*e*), Lord Hardwicke thought that writing a letter to a party did not give the recipient an absolute property in the letter, at least not such a property as to justify him in publishing, but at most a joint property with the

(y) — *v. Leadbitter*, *ante*, p. 205.

(z) *Butterworth v. Robinson*, *ante*, p. 205.

(a) *Ibid.*

(b) *Carron v. Bacles, and Mann v.*

Murray, cited 2 Br. C.C. 165 per M. R.

(c) *Carron v. Bacles*, 1 Cox, 283.

(d) *Prinsep v. Rose*, 2 Br. 86, n.

(3), Bell's ed.

(e) 2 Atk. 342.

writer; and he restrained the defendant, a bookseller, at the suit of Pope, from publishing letters written *by* Pope to Swift and others, but not those written *to* Pope.

So where the case was that Lord Chesterfield had written certain letters to his son, containing instructions for his education and course of life, and some containing characters of living persons; and after his son's death, Lord Chesterfield asked his widow for the letters containing the characters, and she gave them up; but he did not ask for the other letters, nor did she give them up. Lord Apsley thought it clear that Lord Chesterfield, by merely suffering her to keep the letters, could not be held to have given them to her for publication; and that she must be restrained by injunction from publishing such letters, unless with the consent of his executors (*f*).

And where a relation of the testatrix had been permitted during her life to reside in her house, and was residing there at the time of her death, which took place elsewhere, and not only refused to deliver up to the plaintiff, the executrix of the testatrix, letters written to the testatrix by the plaintiff and others which were in the house at the time of her death, but advertised them for publication; Lord Chancellor Manners, referring to *Thompson v. Stanhope* as an authority in point, granted an *ex parte* injunction to restrain such publication (*g*).

In another case it was laid down by Sir Thomas Plumer, that although copyright may subsist in familiar letters, it does not follow that every private letter upon any subject will be protected on the principle of copyright. And the case being that the plaintiff wrote private letters to one of the defendants, in the confidence, as she alleged, that he would not publish or permit them to be published; and the answer of the publisher of the letters swore, that the letters communicated to him were so communicated by the other defendant on the part of the plaintiff, and that it

(*f*) *Thompson v. Stanhope*, Amb.
737.

(*g*) *Earl of Granard v. Dunkin*, 1
Ball & Beat. 207.

was necessary for him to publish them to prove that fact, and to rebut the charge publicly brought against him by the plaintiff, of publishing false information. The injunction was dissolved upon the answer coming in (*h*).

On this case, Lord Eldon observed in a subsequent one (*i*), that he understood his Honor not to have denied the plaintiff's property in the letters, but to have inferred from the circumstances, that she had authorised, and for that reason could not complain of the publication.

In the case of *Gee v. Pritchard* (*k*), Lord Eldon, expressing a doubt as to the soundness of the doctrine of the Court assuming this jurisdiction originally, held himself bound by authority to consider the writer of a letter as having a qualified right of property in it; and that in the case before him, the plaintiff had such a right of property in letters written to the defendant, no act having been done by her to waive that right, and deprive herself of it, as to be entitled to an injunction. His Lordship expressly repudiated the notion of the Court interfering on any ground of the publication of letters being painful to the feelings of the writer; or any other ground than a *right of property*; except in the case where the publication might be requisite for the purposes of justice, as in the case of *Lady Percival v. Phipps* (*l*).

14. These are all the cases that I have been able to find on the question, how far equity will interfere to restrain the publication of letters, and it must be confessed that it is not easy to draw from them a very definite rule. It may, however, perhaps be safe, on the whole, to assume that they establish the following propositions:

1. That the writer of private letters has such a qualified right of property in them, as will entitle him to an injunc-

(*h*) *Lord Percival v. Phipps*, 2 Ves. & Bea. 19.

(*i*) 2 Swans. 415.

(*k*) 2 Swans. 402.

(*l*) 2 Ves. & Bea. *supra*; see on this point pp. 413 and 426.

tion to restrain their publication by the party written to, or his assignees.

II. That the party written to has such a qualified right of property in the letters written to him, as will entitle him or his personal representative to restrain the publication of them by a stranger.

III. That such qualified rights may be displaced by reasons of public policy, or by some personal equity.

15. An injunction will be granted to restrain the publication of an unpublished manuscript (*m*). The ground of these decisions is, that the author not having made the work *publici juris*, it is as much his, as any thing else in his closet (*n*). The doctrine appears to have been first established in the case of the *Duke of Queensberry v. Shebbeare*, which arose on Lord Clarendon's history. In that case, the plaintiff claimed as administrator of A., Lord Clarendon's descendant, to restrain the defendant from publishing the History of the Rebellion; and the defendant claimed under a delivery by A. of the original manuscript to the father of another defendant, with permission to take a copy, and make what use he thought fit of it. But Lord Northington held it was not to be presumed that Lord Clarendon meant the defendant's ancestor to have the profit of multiplying the work in print, though he might make any other use of it except that.

In *Tonson v. Walker* (*o*), decided in 1752, several cases were cited to show that an author had copyright independently of the statute (*p*). But in the great case of *Donaldson v. Beckett* (*q*), it was finally decided by the House of Lords, that an action cannot be maintained for

(*m*) *Webb v. Rose*, 4 Bur. 2330;
2 Bro. P. C. 138; *Forrester v. Wal-*
ker, *ibid.*; *Duke of Queensberry v.*
Shebbeare, Eden, 329.

(*o*) 3 Swans. 672.

(*p*) 8 An. c. 19.

(*q*) 4 Bur. 2408; 2 Br. Parl. Cas.
129.

(*n*) 3 Swans. 680.

pirating a copyright after the expiration of the time mentioned in the statute. In other words, that the legal title of the author is under the statute. The cases therefore referred to, can afford no assistance in cases which would fall within the statute.

16. In the case of *Gurney v. Longman* (r), it was determined, on the authority of *Bathurst v. Kestrelley* (s), and the continued practice of the House of Lords, that when the Speaker of the House of Lords has made an order that a particular person shall publish a trial which has taken place before that House, and that no other person shall publish the same, such party is put by the order in the same situation, as to the particular subject of the order, as the King's printer exercising the right of the Crown as to the prerogative copies. And upon that ground, and not on any ground of literary property, the Court of Chancery in that case restrained the defendant from publishing an account of the trial of Lord Melville, contrary to the order of the House of Lords, until the hearing.

In a case of *Deacon v. Deacon* (t), Lord Eldon seems to have been of opinion that it is illegal to publish part of a depending case. I have not, however, been able to find any case in which the precise point has been determined.

17. Cases occur in which the question is not whether admitting the plaintiff to have copyright in his work, there has been piracy; or whether the plaintiff's work is capable of supporting a title to copyright; but whether, admitting that there is copyright in some persons, the plaintiff maintains such a character as to be entitled to ask for the protection of the Court against the piracy. This was the question in a case where a party was employed by the Board of Admiralty, under the direction of the Crown, to publish a work, consisting of a narrative of a voyage under-

(r) 13 Ves. 493.

v. *Longman*, 502, 504.

(s) 11 Chan. 1776, cited in *Gurney*.

(t) 2 Russ. 607.

taken by officers employed for that purpose by the Crown, the profits of the work to be at the disposal of the Lords of the Admiralty. And it was held that the publisher had not such an interest in the work as would enable him to sustain an injunction against another party for republishing (*u*).

So in a very late case, the agreement between an author and a publisher, after reciting that the author had prepared a TENTH EDITION of his work, and the publisher was desirous of *purchasing the same*; and that it was agreed that a certain printer should print a given number of copies, and the publisher should pay to the author *for the said tenth edition* a certain sum; then went on to direct that the work was to be in a given number of volumes, and *to be sold* to the public for a given price.—It was contended that the plaintiff, the publisher, was not under this agreement the *proprietor of the copyright*, within the meaning of the statute (54 Geo. 3, c. 156, s. 4,) but a mere licensee to sell a given number of copies. The Court overruled the objection, holding that the copyright was equitably vested in the publisher, on the ground that the contract was obligatory on both parties; that the plaintiff was bound to sell; and therefore the author was bound to abstain from doing any thing which could interfere with the act which he had done. The Court therefore thought that the publisher had a limited equitable right in the copyright, to the extent of being entitled to be the sole publisher, until the number of copies fixed by the terms of the agreement should be exhausted. It is to be regretted that the Court did not advert to the question whether the words of purchase of the agreement, viz. that the publisher was to pay for *the edition*, gave him, independently of the implied contract on the part of the author not to do any act which might interfere with the sale, an equitable copyright in the work (*x*).

(*u*) *Nicol v. Stockdale*, 3 Swans. 687.

(*x*) *Sweet v. Cater and others*, 5 Jur. 68.

18. If a lecturer on any subject delivers his lectures from a written composition, whether by reading it, or from memory, an injunction will be granted to restrain publication of those lectures. But the plaintiff must produce the writing (y).

As to the question whether copyright exists at law in oral lectures *simpliciter*, viz. in the subject matter of lectures not put into writing, but published for the first time by oral delivery only, without reference to any question of breach of trust or contract expressed or implied, it was formerly doubtful whether any copyright subsisted in them at law. However, in a case before Lord Eldon, his Lordship seems to have thought, that if a lecturer makes an express contract with his pupils that they are not to publish his lectures, the Court would enjoin a publication made in breach of such contract. And it was decided in that case, that where persons attend as pupils of a lecturer to hear his lectures, they are not at liberty to publish the lectures which they have heard; though of course they may take full notes, amounting even to exact records of them, for their own use. And consequently another person, who, in the absence of evidence as to how he came by them, must, in the opinion of the Court, have obtained them from a pupil, would be restrained (z).

19. The question is now set at rest by the 5 & 6 Will. 4, cap. 65, which enacts, that from and after the 1st day of September, 1835, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures.

By the 3d section it is enacted, that no person allowed for a certain fee and reward or otherwise to attend and be

(y) *Abernethy v. Hutchinson*, 3 Law Journ. 209.

(z) *Ibid.*

present at any lecture delivered at any place, shall be deemed and taken to be licensed, or to have leave to print, copy, and publish such lectures, only because of having leave to attend such lecture or lectures.

But by sect. 5, the operation of the Act is restricted to lectures, of the delivery of which notice in writing shall have been given to two justices living within five miles of the place of lecture, two days before delivery thereof. And it is further provided, that the Act shall not extend to any lecture or lectures delivered in any university or public school, or college, or on any public foundation, or by any individual, in virtue of or according to any gift, endowment, or foundation.

20. Copyright may exist in translations as well as in original compositions; and therefore where the owner of a periodical work, published in his periodical articles translated from foreign languages, the publication of these in another periodical was restrained, and the Court said it was immaterial whether they were made by the plaintiff or given to him (*a*). Another point arose in this case, whether a party who obtains copies of specifications from the office for enrolment, and publishes them, may restrain another from copying such specifications from his work.

The language of the Court on this point is somewhat vague; but as the plaintiff's allegation, which was not contradicted, was, that the defendant copied from the plaintiff's work, and as the injunction against publishing the specifications was refused, the case must, I apprehend, be taken to have decided that specifications of patents may be copied from the book in which they are first published.

It has been determined however (*b*) at law, that a copyright subsists in an engraving made on a reduced scale from the drawing appertaining to the specification of a

(*a*) *Wyatt v. Bernard*, 3 Ves. & Bea. 77.

(*b*) *Newton v. Cowie*, 12 Moore, 457.

patent. And the reasoning of the Court in the case referred to, appears to lean to the position that copyright would subsist also in an engraving made from such a drawing, with or without reduction. The latter point did not, however, call for decision.

(21. It was early determined (*g*) that designing, or engraving, any thing that is already in nature, such, as for instance, medicinal plants, fell within the purview of the 8 Geo. 2, chap. 13, &c., and was the subject of copyright. In the case referred to, a point arose whether it is necessary to support an injunction fall under that act, that the plaintiff should engrave at the foot of the print the date of the first printing, and the name of the proprietor. Lord Hardwicke thought that it was not; but in a later case Lord Alvanley thought otherwise (*h*), and the cases at law were equally contradictory (*i*).

In a late case (*j*) however, in which all the authorities appear to have been cited, the Court of Common Pleas determined that an action cannot be supported for piracy of a print under the 17 Geo. 3, c. 57, unless he has engraved his name and the date of publication thereon, in pursuance of the 8 Geo. 2, cap. 13.

Where A. has painted a picture and engraved it, and secured to himself the copyright of the prints, and B. exhibits a painting copied from one of the prints, on a large scale, as a peculiar kind of exhibition (a diorama), an injunction will not be granted to restrain B., until the right has been established at law, although B. exhibits his copy as "A.'s grand picture painted with dioramic effect;" and although it may be that the sale of A.'s print is in fact injured by such exhibition. The Vice-Chancellor said, he

(*g*) *Blackwell v. Harper*, 2 Ark. 93. *Thompson v. Semonds*, 5 Term Rep. 41.

(*h*) *Harrison v. Hogg*, 2 Ves. jun. 423. (*i*) *Nixon v. Coxon*, 12 Mees. 437.

(*j*) *Dunster v. White*, 1 Camp. 341.

thought the case was not within the 8 Geo. 2, cap. 13, which concerned printing, selling, and publishing, and did not extend to an intention merely to *exhibit* with a certain effect. "If," said his Honor, "A. had exhibited his picture as a diorama, then he might have been entitled to an injunction (*g*)."

The statute above referred to, and the subsequent ones of the 7 Geo. 3, and 17 Geo. 3, being made to protect the artist, are to be considered as being in *pari materiâ*. The object of the legislature in those acts, was to protect those works which are *designed, engraved, etched, or worked* in Great Britain, and not those which are designed, engraved, etched, or worked abroad, and only *published* in Great Britain; and therefore an injunction will not be granted to restrain persons from copying engravings which are *imported* from abroad, where all the design and labour of the artist are given, although they are published here first, and are entered at Stationers' Hall; and although the parties, British subjects, so importing and entering them here, are interested jointly with the foreign publishers in the foreign copyright (*h*).

22. So in a case of a bill for an injunction to restrain imitation of a peculiar label, it was held that the Court will not protect a foreign copyright. And as a consequence of that rule, a demurrer to an injunction bill was allowed where the bill was by two plaintiffs, and one of them was a foreigner, residing abroad, and could not show any interest in the peculiar label (*i*).

23. The decisions under the 8 Geo. 2, and 7 and 17 Geo. 3, proceed on the wording of those statutes, and do not affect the general question whether a foreigner can sustain a copyright for a literary work not within those

(*g*) *Martin v. Wright*, 6 Sim. 297.

(*i*) *Delondre v. Shaw*, 2 Sim. 237.

(*h*) *Page and others v. Townsend*, The case is somewhat obscure.
5 Sim. 395.

particular statutes, where it has been composed by him abroad, but is published first in this country (A).

On that question there has not been any express decision, although in a late case (1), Lord Alinger, C. B., referring to a case of *Buck v. Longman* (a), has intimated an opinion that a foreigner, being the first to publish his work in this country, has copyright in it. And in another (b), before Sir L. Shadwell, V. C., his Honor said, he thought that if an American friend were to write a book in America, and be the first to publish it here, his copyright would be good.

It has been however determined, that where a piece of music has been composed and published abroad, and a considerable time afterwards is sold to a person, who then, for the first time, publishes it in this country, he has no copyright. Lord Brougham said, in the case referred to, on a motion to dissolve an *ex parte* injunction obtained against the defendant, "it appears that this piece of music was published in France by Kalkbrenner, or some one to whom he sold it, so long ago as 1814, six years before the sale to the plaintiff. There can be no question then of the right of the defendant or any one else to publish it in this country (c)."

But where an English subject obtains from a foreign author the copy of his work, and publishes it in this country before its publication either in this or in the foreign country, he brings himself within the statutes for the protection of copyright (p). And where a person thus entitling himself to the copyright of an opera complies with the provisions of the Copyright Acts, an injunction will be granted to restrain another from publishing the music of

(A) 1 Y. & C. 295.

(1) *D'Almeida v. Bovey*, 1 Y. & Col. 288.

(a) Cowp. 623.

(b) *Bentley v. Fetter*, Mr. Mich.

Term, 1833.

(c) *Gresham v. Mori*, 9 Law Jour. 1st ser. 227.

(p) *D'Almeida v. Bovey*, 1 Y. & Col. 288.

such opera in the form of arrangements of waltzes and quadrilles.

It was objected in the case referred to, that the airs of the opera, as originally composed, were not adapted for dancing, and that in the adaptation of them for that purpose, there was sufficient of labour and originality to bring the alleged piracy within the rule of *bonâ fide* alterations. But the Court was of opinion, that if there was a taking of the airs or melodies, which constituted the invention of the composer, there was a piracy.

24. By the 1 & 2 Vict. cap. 59, which recites, that it is desirable to afford protection within her Majesty's dominions to the authors of books first published in foreign countries and their assigns, in cases where protection shall be afforded in such foreign countries to the authors of books first published in her Majesty's dominions and their assigns; the crown has power, by an order in council, to give the sole liberty of printing and reprinting in the British dominions, for such term, not exceeding the term of English copyright, as the Queen shall think fit, to the authors of books published in any foreign country, to be specified by such order in council. But no such order in council is to have effect, unless it is therein stated that protection for the benefit of authors of works first published in the Queen's dominions has been secured by the foreign power, in whose dominions the books to which such order in council shall relate shall be first published. The Act is not to prevent the publication of a translation of any book, whereof the author may be entitled to copyright under the Act. And no author of any book published out of the Queen's dominions is to have any copyright therein in such dominions except under the Act. Lastly, the Act declares that in construing it, the word book shall include volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan. And the word print-

ing and reprinting shall include engraving or any other method of multiplying copies.

25. Where in a suit for an injunction to restrain piracy of copyright, the injury complained of being of very small amount, it was contended that the defendant ought not to pay costs, as it was not fit such a suit should be presented to a hearing. It was held that the defendant ought to have tendered the costs after the injunction was granted, and having refused to do so, he must pay the costs of the suit. In the same case it was held that it was not necessary, although usual, to produce the pirated prints, or any of them, where the fact of the prints being a piracy was alleged and sworn to on the part of the plaintiff, and not denied by the answer (*q*).

In *Bailey v. Taylor* (*r*) it was argued that if a plaintiff cannot in a question of copyright establish his right to relief by injunction, he can have no account; and the Court admitted that there was no jurisdiction to give to a plaintiff a remedy for alleged piracy, unless he can make out that he is entitled to the equitable interposition by injunction; but added, that although he failed on the answer of the defendant to obtain an injunction, he would be at liberty to claim it at the hearing. The case was, as to the merits, that the plaintiff had licensed the defendant's use of his copyright in the defendant's 1st edition. And he allowed the 2nd and 3rd editions to go on for ten years before he applied for relief; and the part of the plaintiff's copyright (consisting of tables of calculations) which the defendant had taken, was a very trifling part of the defendant's work, and it was in evidence that the tables might be calculated in a very short space of time, and at an expense of about 7*l.* 10*s.* On these grounds the Vice-Chancellor refused the injunction. The plaintiff, however, brought the cause to

(*q*) *Franklin v. Hiles*, 2 Russ. & My. 217.

(*r*) 1 Russ. & My. 74.

a hearing, and on the same grounds the Lord Chancellor dismissed the bill with costs.

Where an application is made for an injunction to restrain infringement of copyright, and the Court doubting the title, directs a case for the opinion of a Court of law, and the Court of law certifies that there is no title, the result is, that equity, adopting that view, will refuse the injunction. But that does not put an end to the cause, and allow the defendant to dismiss the bill without more delay. The cause must go on to a hearing, if the plaintiff chuses, for the judge then presiding may entertain a different opinion as to the question of title (s).

(s) *Brooke v. Clarke*, 1 Swans. 550.

CHAPTER III.

Of Injunctions to restrain the Infringement of Patents.

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| 1. Ground of the Injunction. | 7. What extent of Discovery of the Title is requisite to induce Relief of an Injunction. |
| 2. Necessarily necessary to show established Title. | 8. What Affidavit requisite to support Application. |
| 3. At the present day prima facie Title sufficient. | 9. Injunction against Selling after Expiration of Patent. |
| 4. Distinctions as to where the Court will interfere, and where not. | 10. Necessary Allegation in Bill, to prevent Abuses. |
| 5. General Result of the Cases. | |
| 6. Where Injunction not granted till the Hearing. | |

1. **I**N order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, equity interferes by injunction to restrain the infringement of alleged patent rights for inventions (*a*). Generally, indeed, it may be stated that where a right of property is violated by piratical imitation, equity has jurisdiction to interfere (*b*). The jurisdiction, in restraining the infringement of patents, is in aid of a legal right; the plaintiff coming to the Court on the assumption that he has a legal right, and the Court granting its assistance on that ground (*c*).

2. It seems to have been thought formerly that a plaintiff claiming as patentee could not come into equity for an injunction till he had established his right at law. In *Millar v. Taylor* (*d*) Lord Mansfield said that injunctions

(a) *Vide* 2 Story, Eq. Jur. 209; 150.

Jer. Eq. Jur. B. 3, ch. 2, s. 1, p. 327, 1 Fonb. Eq. 31, *notis*.

(b) *Sheriff v. Costes*, 1 Russ. & M.

(c) *Per* Lord Cottenham, C. in *Bacon v. Jones*, 4 My. & Cr. 46.

(d) 4 Burr. 2303.

in Chancery were never granted on motion unless the legal property of the plaintiff was made out, nor continued after answer, unless it still remained clear (*e*). And this appears in truth to have been the old doctrine of Chancery, for in an anonymous case in Vernon (*f*), Lord Keeper refused to grant an injunction at the suit of the King's patentees, to stay the sale of English Bibles printed abroad, unless the patent had been tried at law (*g*).

3. But at the present day it is not generally necessary that the plaintiff should establish his right at law in order to come into equity, the right appearing *primâ facie* on record by the letters patent (*h*). And in the great case of the *Universities of Oxford and Cambridge v. Richardson* (*i*), which turned on the patents granted to the Universities for the special privilege of printing and selling Bibles, Prayer-books, &c. in concurrence with the King's printer, Lord Eldon denied the rule stated by the judges in *Millar v. Taylor* (*k*) as to injunctions, and referring to *Boulton v. Bull* and several other cases, stated the principle particularly in regard to patents to be, that if a party gets his patent and puts his invention in execution, and has proceeded to a sale, that may be called possession under it; however doubtful it may be whether the patent can be sustained, equity will hold that possession under a colour of title is ground enough to enjoin, and to continue the injunction till it shall be proved at law that it is only colour and not real title (*l*). In the principal case the Court doubted whether the plaintiffs, the Universities, had title in themselves alone to sue. But the act of the defendants being clearly illegal, an injunction was continued till the hearing to restrain the defendants from printing and publishing Bibles, &c.

(*e*) 4 Burr. 2400.

(*f*) 1 Vern. 120.

(*g*) See also *Hills v. University of Oxford*, 1 Vern. 275.

(*h*) Mitford's Pl. 147; *Hicks v.*

Raincock, Dick. 647; and see 2 Atk. 391; *Anon.* 1 Ves. sen. 476.

(*i*) 6 Ves. 689.

(*k*) *Millar v. Tayler*, 4 Bur. 2303.

(*l*) *Per* Lord Eldon, 6 Ves. 707.

4. Whether the Court will grant an injunction on the *prima facie* title of the patentee, or will send him to law first, depends on a careful consideration of the circumstances of each particular case.

If there has been possession for a considerable time under letters patent, although the Court may have considerable doubt whether the patent is valid, it will nevertheless protect it by injunction until the right can be tried at law (26).

In *Boulton v. Bull*, the plaintiffs had been in possession twenty-seven years; and an injunction had been obtained by them, that the question of the validity of the patent might be tried at law. In an action they obtained a verdict, subject to a case reserved for the opinion of the Court, and on the argument of that case, the Court was equally divided. On the defendants thereupon moving to dissolve, the Lord Chancellor refused the motion, and refused also to put the plaintiff on any terms in bringing a further action.

But although a patent should be of long standing, yet if there has not been undisturbed exclusive possession of long duration, and doubt is thrown on the title, the Court will refuse an injunction (27). And although on a trial of the right at law a verdict is found for the plaintiff, yet if a rule *nisi* for a new trial is obtained, the Court will still consider the right undetermined at law. And if a patent has been but recently granted, and its validity has not been established at law, and the defendant denies and throws doubt on such validity, equity will not in general act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction without more (28),

(26) *Harmer v. Payne*, 14 Ves. 130; *Boulton v. Bull*, 3 Ves. 140; *Hill v. Thompson*, 3 Mer. 622; see also *Kay v. Myrick*, 1 My. & Cr. 373, in which Lord Cottenham, referring to that case, approved this

principle and applied them to a case of demurrer, p. 382, et seq.

(27) *Coltard v. Alton*, 4 My. & Cr. 407; *Croft v. Gold*, 6 Law Journal, 184.

(28) *Hill v. Thompson*, 3 Mer. 622.

but will send the plaintiff to law before it will grant an injunction. The Court however possesses and exercises great latitude. In *Bacon v. Jones* (*p*), Lord Cottenham said, "Where the application is for an interlocutory injunction, several courses are open. The Court may at once grant the injunction *simpliciter* without more; a course which though very competent to the Court, is not very likely to be taken, when the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken, must depend entirely on the discretion of the Court, according to the case made (*q*)."

If, however, an injunction has been granted in protection of a patent, of which the exclusive enjoyment has been undisturbed for several years, and the defendant is guilty of great delay in coming to dissolve it, the Court will not press on the plaintiff to try his right at law at an inconveniently early period (*r*).

It was held in an early case (*s*) that on a conflict between parties both claiming under patents, the Court could not grant an injunction till the rights had been tried at law; and I am not aware of any modern decision overruling this doctrine as to a conflict between two patents.

5. From the cases referred to, it will be perceived, and indeed it flows almost as a necessary consequence of the doctrine that equity only interferes to restrain the infringe-

(*p*) 4 My. & Cr. 433.

Journ. 188.

(*q*) *Vide* 4 My. & Cr. 436.

(*s*) *Baskett v. Cunninghame*, 2 Ed.

(*r*) *Bickford v. Skewes*, 8 Law

137.

ment of a patent as ancillary to the legal right, that whenever there is any considerable doubt as to the validity of the patent at law, an injunction is either not granted at all, or is only granted on terms, in order to prevent irreparable damage before the title can be tried at law. In a case already referred to several times, the Lord Chancellor observed that he never had granted, and probably never would grant, an injunction to restrain infringement of a patent, without putting the plaintiff to try the right at law, if the defendant desired it (*t*).

But it seems that though the bill should not make a case for an injunction, yet if the answer does, and does not impeach the validity of the patent, an injunction may be granted on the answer (*u*).

6. The ultimate object of a bill in equity to protect a patent is a perpetual injunction, which can in general only be granted at the hearing. And it has been very lately decided, that where a patentee files a bill alleging infringement, and praying an account and perpetual injunction, but does not immediately or within any reasonable time apply for an interlocutory injunction, he cannot have a perpetual injunction at the hearing, if the defendant raises a question as to the validity of the title; nor will he be allowed to retain the bill with liberty to bring an action; for the Court will not permit the plaintiff to delay to the hearing the trial of the legal right which he might have had at any time after filing the bill, and thus to put the defendant in a position to have a chancery suit hanging over him for years, in the result of which he may have to account for several years' profits. The course the Court will adopt in such a case, is to dismiss the bill with costs (*x*).

(*t*) *Bacon v. Jones*, MS. 13 July, 1839.

(*r*) *Bacon v. Jones*, 1 Beav. 392; S. C. on appeal, 4 My. & Cr. 433.

(*u*) *Curtis v. Cutts*, 8 Law J. 184.

7. But as an injunction suit to restrain infringement of a patent rarely comes to a hearing, the point generally calling for consideration in reference to injunctions on this subject, is whether there is such an extent of doubt on the title, or on the right of the plaintiff to ask for assistance in support of it, as to induce the Court to refuse an injunction, or to grant it only on terms. In *Harmer v. Plane*(y), the plaintiff had a patent for a machine for the manufacture of woollen cloths; and before the expiration of that patent obtained a further patent for improvements on the machine which was the subject of the first. The second patent recited the grant of the first; but the specification of the second patent incorporated the description of the original machine, not distinguishing what were the particular improvements which formed alone the subject of the second patent, so that a person reading the specification only of the second would not have known that there were two patents, but would have believed that the patentee was protected in the use of the original machine as well as the improvements, until the expiration of the second patent. The Lord Chancellor said he felt very considerable doubt whether the patent could on that ground be sustained, but on the ground of length of possession (z), notwithstanding that strong doubt, sustained an injunction, putting the plaintiff to try the title at law without delay (a).

But it is clear that where a patent is for improvements on an existing thing in public use, the specification should distinguish the particular improvements from that which is old; and if it describe the whole as one thing without making such distinction, the patent will be bad (b). And where a patentee does not fully enable the public by his

(y) 14 Ves. 130.

(z) The second patent bore date in 1794, and the case came before the Court in 1807.

(a) The specification was held suf-

ficient at law, 2 East, 101.

(b) *M'Farlane v. Price*, 1 Stark. 199; *Manton v. Manton*, Dav. Pat. Ca. 349.

description to obtain the antenuptial requisite for practising the invention, an injunction cannot be sustained. Thus where an invention consisted principally in the application of a peculiar kind of white lead not known in the trade in this country, and only imported from Germany, and it was described in the specification as the "finest and purest chemical white lead," by which name it was not known, and could not be obtained in this country, an injunction obtained *ex parte* was dissolved (e).

8. To obtain an injunction *ex parte* against an alleged infringer, the plaintiff ought to swear at the time of making the application, to his belief that he is the original inventor (d); for although when he obtained his patent he might have very honestly sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information have been communicated, sufficient to convince him that it was not his own original invention, and that he was under a mistake when he made his previous application. And where a patentee has not accompanied his bill by a sufficient affidavit on this point, and fails in sustaining his injunction on other grounds, it will be dissolved with costs on this (e).

9. Where a patentee has established his title at law to an exclusive privilege, equity will restrain other persons from selling after the expiration of the patent, as well as before it, articles piratically made during the continuance of the patent (f).

10. It may not be improper to state here, although it is strictly a point of pleading, that in a bill for an injunction

(e) *Sturz v. De la Rue*, 5 Russ. 322.

(d) 3 Mer. 624; *Sturz v. De la Rue*, 5 Russ. 322.

(e) *Sturz v. De la Rue*, 5 Russ. 322.

(f) *Cranley v. Beverley*, 1 Russ. & My. 166, n.

to restrain infringement of a patent, it is not necessary, for the purpose of preventing a demurrer, to set forth the specification or any part of it; it is sufficient if the plaintiff alleges that he has, by a specification duly enrolled as required by the proviso in the patent, particularly described his invention and the manner of performing it (*g*).

(*g*) *Kay v. Marshall*, 1 My. & Cr. 373; *Westhead v. Keane*, 1 Beav. 287.

CHAPTER IV.

Of Injunctions to restrain the Publication of secret Inventions, and the Use of another's Name or Designation; and the Imitation of Trade Marks.

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| <p>1. Generally an Injunction cannot be granted to restrain the Use or Communication of a secret Invention.</p> <p>2. But may, when Defendant has become fraudulently possessed of it.</p> <p>3. Whether an Injunction could be granted in Aid of an Agreement to keep a Secret.</p> <p>4. Injunctions against Imitation of</p> | <p>Trade Marks where it is fraudulent.</p> <p>5. Where there is no Fraud.</p> <p>6. Injunctions to restrain Use of a partnership Style, or carrying on a Trade, the Goodwill of which has been the Subject of Sale.</p> <p>7. <i>Onier v. Onier</i> 10 Planchard 1. Hill.</p> <p>8. Party asking this Protection must not himself have disclosed the Public.</p> |
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1. **GENERALLY** speaking, a person cannot have an exclusive property in a secret of trade, or in a particular trade mark or designation. There are, however, cases in which, under particular circumstances, a Court of equity, without saying that the plaintiff has for all purposes a right to be protected against invasion of alleged rights of that nature, will hold him entitled to protection against invasion of a particular kind.

It has been determined that an injunction will not be granted to restrain a party from using or making known a secret invention, communicated to him by another on particular conditions, for the obvious reason, that while the invention remains a secret, the Court has no means of judging, whether if it were made known to it, a case would be made for an injunction; and if the invention is made

known, the very groundwork of an injunction is instantly destroyed, because all the world would have as good a right to use it (*a*). And where a bill alleged that the defendant made and sold a medicine identical in composition and quality with the secret medicine of the plaintiff, a demurrer for want of equity was allowed, the Court saying there was no right of property properly so called in a secret medical recipe (*b*).

2. But cases of this nature are to be distinguished from cases where knowledge of a secret invention is fraudulently obtained. Thus, where a person being possessed of a secret medicine, employed another as assistant in his general business, under an express agreement that he was not to be taught the mode of composing the secret medicines, and the assistant obtained, by breach of trust, a knowledge of those medicines, he was restrained by injunction from using or communicating them (*c*).

So where one agrees with another to take him into partnership for the manufacture of a medicine made according to a secret recipe, and on the faith of such agreement instructs him in the secret, and puts him in possession of the medicines, the Court will so far carry the agreement into effect, as to restrain the party from selling the medicines, or otherwise interfering in the management of the business, against the permission of the other party; but as to the alleged *secret*, if the defendant by his affidavit insists that it is not a secret communicated by the plaintiff, he will not be restrained from divulging it; and if it had been originally the plaintiff's secret, and the defendant had already divulged it, an injunction would not be granted, because then it would be of no use (*d*).

(*a*) *Newberry v. James*, 2 Mer. 446.

(*b*) *Canham v. Jones*, 2 Ves. & Be. 218.

(*c*) *Yovatt v. Winyard*, 1 Jac. & W. 394.

(*d*) *Williams v. Williams*, 3 Mer. 157.

3. Whether, if a party had by contract promised to keep a secret, the Court would, in the exercise of its jurisdiction to decree the specific performance of agreements, restrain him from disclosing the secret that he had so contracted to keep, is to be doubted (*d*). Whatever might be the decision on principle, it is clear that as regards any practical use of an injunction in such a case, the reasoning of the Court in *Neuberry v. James* would be applicable; for the Court could not ascertain whether the defendant was going to infringe the terms of the contract by divulging the particular secret, the subject of the agreement, without evidence of what that secret was; and the communication of such evidence would of itself cut away the ground for an injunction.

4. With regard to the right to protection in the use of trade marks, and generally in the enjoyment of a particular trade designation or reputation, it may be inferred from some of the cases, that a party cannot acquire, strictly speaking, any exclusive title to a particular trade mark or sign; but that the Court enjoins on this principle, that it will not allow a party to commit a double fraud, by holding out to the public marks and signs by which he induces the belief, that they are dealing with a person different from the one they are actually dealing with, and avails himself of the reputation acquired by another.

That the Court will interfere against this sort of fraudulent use of another's name or reputation, is now well established by many cases.

In a case cited in argument in *Canham v. Jones*, where the defendant having sold his right in a medicine to the plaintiff, set up the manufacture and sale of another under a similar description, and in his advertisement adopted verses which had been attached to the original medicine, an injunction was granted (*e*).

So in a case cited by Lord Henley, in his treatise on in-

(*d*) 3 Mer. 160.

(*e*) *Sedon v. Senate*, cited 2 Ves. & Bea. 220.

junctions (*f*), a manufacturer of blacking was restrained from using labels in imitation of those employed by the plaintiff. And in a late case it has been determined, that a manufacturer will be restrained from using certain letters and figures with which a patentee was in the habit of marking his patent articles (*g*).

The leading modern case, however, on this subject, is *Knott v. Morgan* (*h*), in which the doctrine was carried to a great length. In that case the plaintiff was shareholder of a company who had established omnibuses of a somewhat novel arrangement, and designated by peculiar marks and appointments, and in particular, by the title painted on them of "London Conveyance Company." The defendants had imitated the style and appointments of the plaintiff in almost all respects, particularly in painting on their omnibuses the words "Conveyance Company," and "London Conveyance Company." On being remonstrated with, they introduced certain colourable variations, but in such a manner as not to be generally visible to the public; as for instance, they introduced between the words "Conveyance" and "Company" the word "for," in very small characters. On this state of circumstances, Lord Langdale, M. R., after disposing of a technical objection, said, "the only other question is, whether the defendant fraudulently imitated the title and insignia used by the plaintiffs, for the purpose of injuring them in their trade; and upon the affidavits and evidence before me, I have not the least doubt that the defendant did intend the public to believe that the omnibus which he painted and appointed so as to resemble the carriages of the plaintiff, was, in fact, an omnibus belonging to the plaintiff and the other proprietors of the London Conveyance Company. *It is not to be said that the plaintiffs have an exclusive right to the words "Conveyance Company," or "London Conveyance Com-*

(*f*) *Day v. Day*, Eden on Injunctions, 314.

Journ. 161.

(*h*) 2 Keen, 213.

(*g*) *Ransome v. Bentall*, 3 Law

pany," or any other words. But they have a right to call upon this Court to restrain the defendant from fraudulently using precisely the same words and devices, which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation, that carriages really the defendant's, belong to and are under the management of the plaintiff. The Lordship accordingly granted an injunction to restrain the defendant from using any omnibus having painted, printed, stamped or written thereon the words or names "London Conveyance," or "Original Conveyance for Company," or any other names, words or devices, painted, stamped, printed or written thereon, in such manner as to form or be a colourable imitation of the names, words and devices, painted, stamped, printed or written on the omnibuses of the plaintiff. And on appeal, the Lord Chancellor affirmed this order.

5. In *Millington v. Fox* (i), the doctrine was carried a step further; for that case seems to establish that fraud in the imitation of a trade mark is not necessary to entitle the plaintiff to protection. The plaintiffs, in *Millington v. Fox*, had used certain marks on steel manufactured by them for a great length of time; the defendants had used the same marks, in ignorance of the fact of any exclusive claim by the plaintiffs, or even of the existence of the plaintiffs; and it was proved that the use of those marks was in the trade very generally, in conversation at least, considered as indicative not of particular makers, but of particular qualities of steel. Lord Cottenham, C., held, that the plaintiffs had a title to the marks in question, and were not deprived, by the circumstance that the defendants had used it without fraudulent intent, of their right to the marks and to the assistance of equity; and a perpetual injunction was decreed.

(i) 3 Myl. & Cr. 338.

The same point had previously arisen in a case of *Motley v. Downman* (*k*), but did not receive an express decision, as the case went off on another point of considerable nicety. Certain tin plate manufacturers had established a manufactory at certain works, and had there for a long series of years marked their plates with the letters "M. C.," and the plates manufactured at those works became known in the market by the name of the "M. C. Tin Plates." At the dissolution of the partnership, one of the partners, who had been so only for a few years, took a lease of the works, and there for some time used the mark "M. C.;" he then removed to another place, and there continued to manufacture and to use the same mark, retaining, however, his lease. The original works remained closed for about nine years after the termination of the lease, and then the lessor relet them, and the new lessee commenced manufacturing and using the marks "M. C.;" on which the original lessee filed his bill for an injunction, alleging that he had acquired an exclusive right to the mark "M. C.;" so that the question was whether the plaintiff, who had originally derived, as lessee of the works, the benefit of using the mark, which, at any rate, until then had attached to the place, acquired by so using it as such lessee, not merely the personal right to use the mark in common with the landlord, but the exclusive personal right. The Lord Chancellor gave no opinion on the legal right, and discharged an order which had been made by the Court below for an injunction, giving the plaintiff liberty to bring an action, the defendants not to be prejudiced in the meantime.

6. Under this head may also be ranged cases upon the use of a partnership style; and those where a trader has sold the goodwill of his business, and the question is under what circumstances he is afterwards justified in carrying on the same business in the same place. Of the former

(*k*) 3 Myl. & Cr. 1.

kind is a late case (1), in which a firm had acquired great reputation as pencil makers, under the style of "Brookman and Langdon," and the right to use the style of the firm passing to the widow of Langdon after his death, she carried on the business in copartnership with B., under the same style; it was held that on her death, the right to use the style of the firm passed by survivorship to the surviving partner B., and not to the next of kin of the original manufacturer, Langdon; and therefore B., continuing after Mrs. Langdon's death to carry on the business under the style of "Lewis & Co. successors to Brookman and Langdon," was held entitled to an injunction to restrain one A. Langdon, who claimed to be the next of kin of Langdon the original pencil maker, from carrying on the business of pencil making, under the style of "Brookman and Langdon." Of the second kind is the case of *Cruttwell v. Tyne* (m). In that case the defendant had been a common carrier, and became bankrupt; the assignees sold his business, with the goodwill; afterwards the bankrupt obtained his certificate, and recommenced business; and he then stated both by advertisement and by handbills, that he had been reinstated by his friends in the carrying business, and informed the public that his waggons set out at the usual hour; and described the course of their journey, which included the line over which the waggons of the original business travelled. It was held that this was no more than asserting his right to carry on a like trade with that sold, and did not amount to holding himself out as carrying on the purchaser's trade, and consequently Lord Eldon refused to grant an injunction to restrain him. But if the conduct of the bankrupt had been such as to amount to a fraudulent representation, tending to lead the public to imagine not merely that he was resuming the purpose of obtaining trade, but was actually carrying on the identical business which he had sold, it would have been otherwise (n). It may perhaps be thought that the distinction is

(1) *Lewis v. Langdon*, 7 Sim. 421.

(n) 17 Ves. 341, 342.

(m) 17 Ves. 335.

somewhat refined, which makes it lawful for a party having sold the goodwill of a business, to set up in opposition to his vendee in a business conducted in the same place, and for all practical purposes the same; and which makes it unlawful for him to hold himself out as carrying on the old business. For in either case, it is tolerably clear that the vendee must be materially injured, and has not in fact what he intended to purchase. The distinction, however, if closely examined, will appear to be founded upon principles of justice. For the sale of a goodwill cannot, in the absence of express stipulation, amount to any evidence of intention or promise on the part of the vendor to give up his natural right of carrying on what trade and in what place he may choose; and the injury the vendee suffers, arises not from the invasion of any right of his, but from the circumstance of another person exercising his own right; whereas if the vendor holds himself out as carrying on the old business, he is in fact availing himself of that reputation or name which is the exclusive property of the purchaser; so that in that case the purchaser suffers damage, not by the accident of another being his rival, but by reason of a direct invasion of his rights.

7. Before concluding this subject, it is proper to notice an old case (*o*), which has been much relied on in the arguments in cases upon trade marks, to prove that a party ought not to be protected in the exclusive use of a trade mark. The case referred to was, that the plaintiff claimed the exclusive right to use a particular stamp on his cards; and Lord Hardwicke said, that he knew no instance of granting an injunction to restrain one tradesman from using the same mark as another. But this observation must, it is submitted, be taken with reference to the case before the Court. It appears by the report in Atkins (*p*), that the plaintiff's title, if he had any, rested upon a charter; the Court held that to be clearly an illegal monopoly;

(*o*) *Blanchard v. Hill*, 2 Atk. 484.

(*p*) *Ibid.*

and it was not alleged on the part of the plaintiff, that he had used the stamp to such an extent, that cards sold with it acquired by that means in the market the reputation of being his. The case, therefore, was simply that the plaintiff claimed under a particular title which was held bad, and did not show any other title. The decision was on the title as claimant under a charter, and the point, whether a title could be acquired by connecting by long continued exclusive use a particular mark with the reputation of a particular trader, did not call for or receive any decision. This case is not therefore, it is submitted, inconsistent with the modern cases on the subject.

8. It must be observed, also, that the rule that a party may by using a particular trade mark or designation acquire such a right in it as to prevent another person from selling under the same designation, is, however, subject to the general rule of equity, that a person will not be protected in equity, who does not come before the Court on a case founded on truth. And therefore in a case where the plaintiff sold a particular tea under the designation of Howqua's mixture, holding it out, contrary to the fact, as a mixture made in China by a Hong merchant of the name of Howqua, whereas in truth it was mixed in England by the plaintiff himself, the Court refused to protect him by injunction against the sale by the defendant of teas under the same designation (*q*).

(*q*) *Pidding v. Howe*, 8 Sim. 477.

CHAPTER V.

Of Injunctions to restrain Nuisance.

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| 1. <i>General Principle of the Jurisdiction.</i>
2. <i>Ancillary to the legal Right.</i>
3. <i>Injunction not granted to prevent Obstruction of Prospect.</i>
4. <i>Order not made on Motion to pull a Thing down.</i>
5. <i>Proper Course of Proceeding to stay Nuisance, public or private.</i>
6. <i>What constitutes sufficient Nuisance to justify equitable Interference.</i> | 7. <i>What a sufficient Allegation of Nuisance,</i>
8. <i>Of darkening ancient Lights.</i>
9. <i>Of Nuisance in respect to Markets.</i>
10. <i>Jurisdiction of Commissioners of Sewers.</i>
11. <i>Injunction to restrain Nuisance, resulting from Order of Magistrates in Quarter Sessions.</i>
12. <i>No Injunction against contingent Nuisance.</i>
13. <i>Of Purpresture.</i> |
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1. **THE** jurisdiction of equity to grant relief by injunction against nuisance, whether public or private, is founded on the right to restrain the exercise or the erection of that from which irreparable damage to individuals or great public injury would ensue(*a*). It is now quite settled(*b*), although it is exercised with great caution(*c*).

In an early case it was laid down that every common trespass is not a foundation for an injunction, when it is contingent and temporary; although if it continues so long as to become a nuisance, the Court will interfere(*d*); and it has been decided in later cases that the Court will not in general interfere to suspend the operation of manufactories

(*a*) 3 Atk. 751; and see Eden on Injun. 222; and Red. Pl. 144.

(*b*) Red. Pl. 144; *Attorney General v. Nichol*, 16 Ves. 338; 1 Dick. 164; and see Lord Brougham's observations

in *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 181.

(*c*) 18 Ves. 217; 19 Ves. 622.

(*d*) *Coulson v. White*, 3 Atk. 21.

that cannot be established without immense expenditure, upon an *ex parte* application, but will require notice of motion to be given (e).

2. The jurisdiction of Chancery to restrain nuisance by injunction exists for the purpose of protecting the legal right, and is not an original jurisdiction, and therefore where no reason is shown why a plaintiff has not in the first instance proceeded to establish his right at law, the Court will not, on conflicting affidavits, try the question of nuisance (f). But as in a plain case of waste, upon certificate of bill filed and affidavit of the waste, there may be an injunction before answer, so there may in a plain case of nuisance, as for stopping up lights, on affidavit, certificate, and notice; because the Court will not suffer it to go on to prejudice the party in the mean time, but will stop it beforehand (g). And where on an *ex parte* motion for an injunction, the affidavit swears that the defendant has pulled down buildings, and is proceeding to rebuild them in such a manner as to obstruct plaintiff's ancient windows, specifically pointing out the nature of the alterations, and distinctly swearing to the fact that the alterations will darken entirely ancient windows formerly unobstructed, and so as to impede the free admission of light and air, an injunction will be granted till answer or further order.

3. But where the alleged nuisance is building so as to interrupt merely a *prospect*, there must be an agreement shown, or ground shown for presuming it, otherwise the Court will not interfere before the defendant has an opportunity to answer (h).

(e) *Attorney General v. Claver*, 1 Ves. 211; see p. 217; see also 19 Ves. 622.

(f) *Scuple v. London and Birmingham Railway Company*, 1 Rail. Cas. 120.

(g) *Attorney General v. Dugby*, 2 Ves. sen. 453; *Attorney-General v. Nicholl*, 3 Mer. 687.

(h) *Attorney-General v. Dugby*, 2 Ves. sen. 453.

In the case referred to, it was urged that Lord Jefferies had granted in 1686 several orders to restrain interrupting the prospect in question. But Lord Hardwicke observed that those orders were made on petition without bill filed, and were to be laid out of the case.

It is true that in a case before Lord Thurlow (*i*), a bill was filed for a decree to keep the sills of fish ponds in repair; and for an injunction against obstructing them, and from erecting further buildings, they having begun such as *would interrupt the prospect from the plaintiff's house, and would be disagreeable objects*; and to this bill a demurrer being put in, Lord Thurlow overruled it, on the authority of a case of *Lord Kilmorey v. Thackeray*, in which, on a *covenant to keep the banks of a river in repair*, the Court of Exchequer had granted an injunction. If no more was alleged by the bill and proved in *Bathurst v. Burden* than is stated in the report, it is clear that at this day such a bill would not be supported. And it is remarkable that Lord Thurlow mainly grounded his decision on the authority of a case in which there was an express *covenant to repair*, and in which therefore the injunction was probably granted on that ground.

It is clear, however, that now, in the absence of express covenant, an injunction cannot be sustained on the mere ground of interrupting a man's prospect, or erecting disagreeable objects (*k*). As to the prayer for a decree to repair, although a decree specifically to repair would not now be made, it will be shown in a subsequent part of these sheets, that, by an injunction specially worded, the same effect might perhaps be obtained (*l*).

4. The Court will not in general on motion order a thing to be pulled down to remove an alleged private nuisance,

(*i*) *Bathurst v. Burden*, 2 Br. C.C. 64.

Ves. 338

(*k*) 2 Ves. sen. 453, 454; 1 Dick. 165; *Attorney-General v. Nicholl*, 16

(*l*) See *Lane v. Newdigate*, 10 Ves. 192; and the other cases on this point, *post*, chap. vi.

although it may sometimes do so on decree (*m*). But in a case of building, so as to obstruct the plaintiff's lights, where the defendant having put in his answer, it was clear that the right must be decided at law, the Court directed that the parties should proceed as quickly as possible to try the right, and that the scaffolding already erected should be pulled down, and the defendant restrained from building or erecting so as to obstruct the plaintiff's lights until after trial had (*n*).

5. In cases of public nuisance only, the proper course is to file an information at the suit of the Attorney General (*o*), or at any rate, if the suit be instituted by bill, the Attorney General should be a party. But where a case of nuisance is made, producing private injury to the plaintiff, although it may also produce public injury, a bill for an injunction may be filed by the party suffering the private injury, and the Attorney General need not be made a party (*p*). This point arose again on demurrer in a very late case (*q*), in which the bill alleging the act complained of to be both a private and public nuisance, the defendant demurred for want of parties, because the Attorney General was not a party; but the Vice-Chancellor held that the bill containing an allegation of private nuisance, the allegation of public nuisance was immaterial, and did not make the Attorney General a necessary party.

The Court will not in general, on an information at the relation of individuals, interfere to prevent the continuance of a manufacture alleged to be a nuisance, without a trial at law (*r*). Whether where an indictment against the nuisance is pending, the Court will interfere to controul the

(*m*) *Ryder v. Bentham*, 1 Ves. sen. 543.

(*n*) *Ibid.*

(*o*) *Baines v. Barker*, Amb. 158; *Anon.* 3 Atk. 751; Red. Pl. 144.

(*p*) *Crowder v. Tinkler*, 19 Ves.

617; *Spencer v. London and Birmingham Railway Company*, 8 Sim. 193.

(*q*) *Sampson v. Smith*, 8 Sim. 272.

(*r*) *Attorney-General v. Cleaver*, 18 Ves. 211.

proceedings in the indictment for the purpose of promoting a speedy trial, seems questionable. At any rate it will not do so as a matter of course. For although circumstances may give the Court a control over the indictment, as for instance, where the relators in the information are the persons prosecuting the indictment, the Court of Chancery has undoubtedly no original jurisdiction either to enjoin or to regulate the proceedings on an indictment(s). And where a bill of indictment had been found against the defendants in equity, for carrying on a soap and black ash manufactory, and they had removed the proceedings by *certiorari* into the King's Bench, Lord Eldon refused to interfere against them by injunction for the purpose of pressing on the time of trial, partly it would seem on the ground of his doubts of the jurisdiction, though principally on that of laches in the relators(t).

6. The question, what amounts to such nuisance as to call for the interference of the Court, was much discussed in the case of *Crowder v. Tinkler*(u), which was a case of alleged nuisance from a powder mill. No point on this subject was actually decided, but Lord Eldon entered at some length into an examination of the jurisdiction in nuisance, and from what fell from his Lordship the following points may be collected :—

I. That where the attorney-general is a party to a bill for a nuisance, still, unless it is clearly a public nuisance, the Court will not enjoin till the question has been tried at law.

II. That although a bill should unnecessarily allege a public nuisance, yet if the matter complained of is not a public nuisance simply, but what being so in its nature is attended with extreme probability of irreparable injury to

(s) 18 Ves. 220.

(u) 19 Ves. 617.

(t) *Attorney-General v. Cleaver*, 18 Ves. 211.

private property, including also danger to life, an injunction will be granted.

III. That because an article, such as gunpowder for instance, is one of recent origin, that is not a reason for holding that at common law the erection of a gunpowder-mill, if attended with danger to the public, would not be a nuisance. The principle of law is, that any subject of modern discovery cannot be used in such a manner as to constitute nuisance, merely on the ground that the materials are of modern discovery.

IV. That an act of parliament making it illegal to carry on a certain manufacture except in mills of a certain construction, does not, by excepting from the operation of the act the mills actually working at the time of its passing, preclude the inquiry whether such mills would be a nuisance at common law; and therefore does not make it necessarily legal to carry on the trade in a mill erected on the site of one in existence at the time of passing the act, if such mill from its construction and site would be a nuisance at common law.

An injunction has been refused at the suit of an individual to restrain the building of a hospital for taking in patients, suffering from a contagious disease (*x*). The decision in the case referred to can hardly however be regarded as a general authority; because it seems to have gone very much on special considerations applicable to the time (1752), and to the nature of that particular case. The proposed hospital was for the cure of small-pox, and was about to be erected in what were then the outskirts of London. The disease, it must be remembered also, was at that period so fatal and so dreaded, as to make it a matter of overwhelming public importance to provide means for its cure. The Lord Chancellor stated his opinion that it was a charity like to prove of great advantage to mankind; and said such an hospital must not be far from a town, because those that are attacked with those disorders in a natural way

(*x*) *Baines v. Baker*, Amb. 158.

may not be in a condition to be carried far. The decision was partly also grounded on this point, that, if a nuisance at all, it was a public nuisance only ; and therefore that the relief ought to have been sought by information(*y*).

In a late case, an act of parliament empowered the Commissioners of Woods and Forests to make certain new streets according to a particular plan therein referred to, and to lease, and to enter into agreements for leasing, the ground on the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected some houses in the line of one of the new streets. The plan referred to in the act of parliament exhibited an open space in front of the sites of these houses, but that plan was not mentioned in the leases. The intended streets were completed, and the space in front of the houses was left open. The Commissioners of Woods and Forests, and the paving committee of the parish, afterwards gave permission to certain persons to erect an equestrian statue in the open space, and these persons proceeded to place it there, without however interfering with the line of the carriage way of the new street in which the plaintiff's houses stood. The plaintiff thereupon filed a bill to restrain the erection of the statue, alleging that upon the treaty for the leases, the lessees were shown the plan of the intended new street and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue. They also alleged that the proposed erection would diminish the value of their property, and be a public and a private nuisance. It was, however, held that these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue either on the

(*y*) See also a case of — v. — principal case, Amb. 159.
Frewen, cited by the Court in the

ground of contract, or of nuisance. The Lord Chancellor thought it a clear point, that it would be no public nuisance. And whether the private injury amounted to nuisance or not, he left the parties to try at law if they thought fit (z).

But where a railway company were restricted by their act of parliament from using, damaging, passing along, or interfering with a particular road belonging to a canal company, (leading to the wharfs and towing path, and made by the canal company for the joint use of themselves and their lessees,) except by the licence of the canal company, under their seal; and the canal company had given the railway company some sort of licence, though not under their seal, to use the road; it was held that using it by carting on to the road such large masses of clay as would require several days to move, just opposite and so as to obstruct the cart-way into the premises of a lessee of the canal company, was such a nuisance and unreasonable use of the road as to justify an *ex parte* injunction; and afterwards to support it, to the extent of restraining the company from laying down quantities of clay, &c. on the road, but not to the extent of restraining them from passing along and using the road (a). And pending proceedings at law to try the right of the plaintiff to the use of water, as he claims it, by a watercourse, equity will restrain the defendants from obstructing such watercourse; but proper provisions should be made for having the question tried at law (b).

7. It may here be observed, that if a bill alleges that a certain thing is a nuisance to the plaintiff by damaging his trade, a demurrer cannot be sustained for want of equity, on the ground that the nuisance is not shown to be such as to be incompatible with the enjoyment of life and

(z) *Squire v. Campbell*, 1 My. & Cr. 459.

way Cases, 409.

(a) *Temple v. London and Birmingham Railway Company*, 1 Rail-

(b) *Deukhist v. Wrigley*, C. P. Coop. 319.

health(c). Indeed it seems plain that in such a case, the word "nuisance" having a particular legal meaning, the demurrer admitting the nuisance admits the equity.

8. A very old head of jurisdiction in cases of nuisance is that of darkening ancient lights; viz. where one having a house in which are ancient windows, another erects some house or building which intercepts the light of those windows.

It does not follow, however, because a man might support an action on the case against his neighbour for making a window in his own wall, or for raising the wall, that a Court of equity has jurisdiction.

The foundation of the jurisdiction is that sort of material injury to the comfort and existence of those who dwell in the neighbouring house, which requires the application of a power not merely to remedy an injury for which damages more or less would be given in an action at law, but to prevent it.

The position of the building, whether opposite, oblique, or at right angles to the windows is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated by damages, but prevented by injunction.

A diminution of the value of the premises is not a ground for the interposition of equity; nor will it interpose upon every degree of darkening lights and windows.

The principle seems to be this: that where the injury inflicted is of a nature that can properly be met by pecuniary compensation, equity will not interfere; but where it is of such a nature as would probably compel the party by its pressure to abandon his residence, then equity will restrain the commission of the injury(d).

(c) *Sampson v. Smith*, MS. 15th Mar. 1838; and see S. C. 8 Sim. 272. (d) *Attorney-General v. Nichol* 16 Ves. 338.

These doctrines are supported by an early case, in which an injunction was refused to stay parties in the city of London from building a wall opposite the plaintiff's windows, within seventeen feet thereof, as it did not appear that they were ancient lights, and the proximity was not such as to be a nuisance (e). So in a more modern one, before Sir Thomas Plumer (f), where the defendant was erecting buildings in the city of London, darkening the plaintiff's ancient lights, but it did not appear that in the interval before the trial of the right at law, the comfort of the plaintiff would be materially interfered with, and the right at law was doubtful, owing to a peculiar custom of the city of London, the Court refused to grant an injunction.

It must also be observed, that to justify the interference of equity, the lights must be *ancient* lights, for which the plaintiff has prescription (g), or else the act must be in violation of some agreement expressed or implied (h).

In a late case, where the defendant, holding under a lease from an ecclesiastical corporation, was about to rebuild the house in such a way as to obstruct the plaintiff's ancient lights, the right of the defendant's lessors to erect such buildings not appearing clear, and the right of the lessee still less so, the Court, thinking the obstruction came within the principle of the *Attorney-General v. Nicholl*, granted an injunction till the right should be tried (i).

9. It is a nuisance to hold a new market too near an ancient one (k); but the owner of the ancient market cannot, in general, come originally into equity for an injunction before any trial of the right at law (l). Where, how-

(e) *Tinmouths' Company v. Post Indica Company*, 1 Dick. 163.

(f) *Winstanley v. Lee*, 2 Swan. 333.

(g) 1 Dick. 164, *Morris v. Lord Berkeley*, 2 Ves. sen. 453.

(h) *Morris v. Lord Berkeley*; *Attorney-General v. Nichol*, 12 Ves.

338.

(i) *Sutton v. Lady Montfort*, 4 Sim. 569.

(k) 2 Roll. Abr. 140, G. 2; *Yard v. Ford*, 2 Saund. 172.

(l) *Amos*, 2 Ves. sen. 414, and see 3 Atk. 726.

ever, the title to a franchise, such as an ancient ferry, appears on record, as by a decree in Chancery, an injunction will be granted, if the affidavit show satisfactorily that the plaintiff has kept sufficient ferry boats, but not otherwise (*m*).

So in the case of a market, it has been held that to support an application by the owner of an ancient market, asking for an injunction to restrain a new one set up near it, it is essential to show that the old one is sufficient for the accommodation of the public (*n*). But although the fact of an ancient franchise not being shown to be sufficient for the accommodation of the public, will deprive the owner of his right to restrain interference with his franchise, and although a person going to the market, and being refused such accommodation as he is by law entitled to, might have an action for damages, it does not follow that a bill might be filed for an injunction to permit any person to come to the market that pleases. And it seems it could not (*o*).

10. The commissioners of sewers, under the statute 23 H. 8, c. 5, are a Court of record, and if they exceed their jurisdiction, the remedy is in the Court of Queen's Bench by *certiorari*. And although it is not decided that there are no cases in which equity would interfere by injunction against their acts, yet in a case before Lord Eldon, where the commissioners having made an order on the plaintiffs to remove certain constructions made by them on the river Waveney, the plaintiffs came for a perpetual injunction, Lord Eldon said, that after the opportunity the plaintiff had had of taking a much shorter course (by *certiorari*), equity ought not to interfere (*p*). There seems, however, no reason to doubt, that if the commissioners of sewers, in the execution of what they conceive

(*m*) *Anon.* 1 Ves. sen. 476.

(*o*) 1 Jac. & W. 374.

(*n*) *Ex parte Reilly*, 1 Ves. jun.

(*p*) *Kerrison v. Sparrow*, 19 Ves.

their duty, were to create or occasion a public nuisance, equity would have jurisdiction to interfere (*q*).

11. A new question arose in a late case, as to the jurisdiction of equity in matters of public nuisance. A bridge connected two counties; one half being within the jurisdiction of one, and the other half of the other; and the two counties were jointly liable to the repairs. On the occasion of its being out of repair, the two counties could not agree as to the mode of repairing it, and the magistrates of county A. repaired their half, as far as the middle of the centre arch, by attaching new joints to the old ones, and bracing up such new joints by ties, &c. On this the magistrates in sessions assembled of county B. threatened to cut away the old beams from so far as they were supported by the last pier in their county; but Lord Cottenham, C., held that this would operate as a public nuisance, and would be in effect a compulsion on the magistrates of county A. to give up their own plan of repairs, and adopt another. It was urged that the Court would be interfering with the jurisdiction of the Court of quarter sessions, but to this the Lord Chancellor replied, that the injunction was not an interference with the orders of the Court of sessions *within their own county*, but only a restriction preventing the magistrates of that county from doing an act which would work a *public nuisance out of their jurisdiction* (*r*).

12. Equity will not interfere to prevent a contingent nuisance, that is, an act which may or may not be a nuisance, according to the mode in which it is done. This was decided in a very late case (*s*), in which an injunction was sought to restrain the defendants from erecting or using steam engines for draining certain low lands, which had theretofore been drained by means of windmills. The ground on which it was put was, that the use of such

(*q*) See 2 My. & Cr. 123, and My. & Cr. 123.

Bay v. Allen, 1 Dick. 49.

(*r*) *Earl of Ripon v. Hobart*, 3 My.

(*r*) *Attorney-General v. Forbes*, 2 & K 109.

engines, instead of the machines theretofore used, would injure the banks of a river, of the navigation of which the plaintiffs were commissioners, by throwing into such river in times of flood too great a mass of water. The application was refused on several grounds: first, on the ground of laches; but principally on the ground that there was no case made for the prevention of irreparable mischief; that the erection and use of steam-engines would not, of necessity, be mischievous; but that would depend on the mode of using them, and that therefore the alleged mischief was an eventual or contingent nuisance only. In the course of his judgment Lord Brougham, C., laid down the rule respecting the relief by injunction as applied to such cases thus—"If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief, without waiting for the result of a trial, and will, according to the circumstances, direct an issue, or allow an action, and if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the Court will refuse to interfere until the matter has been tried at law, generally by an action, though, in particular cases, an issue may be directed for the satisfaction of the Court, where an action could not be framed so as to meet the question (*t*)."

13. In case of nuisance and purpresture, that is, incroachment on an arm of the sea or port, or on the soil between high and low water mark, which is in the crown; having the effect of an injury to the right of the crown, as well as a nuisance to the public, a decree for abatement of the existing purpresture and nuisance, and for an injunction will be granted (*u*).

(*t*) *Earl of Ripon v. Hobart*, 3 My. 2 Ans. 603; see also 18 Ves. 218; & K. 169. Red. Pl. 150; *Attorney-General v.*

(*u*) *Attorney-General v. Richards*, *Johnson*, 2 Wils. 87.

CHAPTER VI.

Of Injunctions in Aid of specific Performance; and to restrain Breach of Trust or Confidence.

1. General Doctrine as to Injunctions in Aid of specific Performance.
2. Injunctions in Aid of specific Enforcement of Agreements as to purchase Land.
3. Where Equity intervenes in Agreement to Injure, an Injunction which would have no effect at Law.
4. Injunctions to restrain Breach of Covenant in Lease.
5. It is not a tortious Breach.
6. Where Injunction to restrain Proceedings in an arbitration.
7. Of the Jurisdiction to enjoin by Injunction, where an Agreement actual or supposed as a whole.
8. Of the Jurisdiction indirectly by Injunction to enforce the Performance of a tortious Act.
9. Qualification of the Doctrine.
10. Result of the Authorities.
11. Equity will not even circuitously compel the carrying on of a Trade.
12. Injunctions to restrain Breach of Trust.
 1. Where Breach of positive Trust.
 2. Where Conduct is inconsistent with implied Trust, or
 3. Where the Party files a fiduciary Character, or has de facto a Confidence reposed in him.
13. Also embracing Injunctions to enforce the fiduciary Relations between Solicitor and Client.
14. Of Injunctions to restrain the Plaintiff and Plaintiff of particular Counts.
15. Difference with the Interference by Injunction, where the Title is legal, and where it is equitable.
16. Forms and Provisions of these Titles as showing, under a Trust must clearly show that their Title is a continuing one.
17. Injunctions to restrain Acts inconsistent with giving full Effect to an Agreement.
18. Of Cases where Parties Agree themselves of their Right to the assistance of Equity for enforcing an Agreement.
19. And serves as justification of the Effect of Law.
20. Construction of Promises for restoring denied Promises.
21. Injunctions to restrain under Circumstances presenting to a Banefice.
22. Special Case of Construction of an Agreement to let Farms.
23. Necessary that Party suing for Relief should be competent to bind himself.

1. IN general, equity will interfere by injunction in aid of a party who is *prima facie* entitled to the specific per-

formance of an agreement; on this principle it is that the Court, as we have seen, relieves in certain cases, against proceedings at law, instituted by purchasers to recover their deposits; and to compel indirectly the observance of covenants by lessees, by restraining such acts as amount to a breach of the covenants. And on the same principle equity will in many instances, which will be illustrated by the cases collected under this head, restrain acts inconsistent with the due performance of agreements.

An early instance, the earliest it is said (a) in which equity interfered to restrain breach of agreements by an injunction, is a case of *Martin v. Nutkin*(b), in which the defendants, who were the parson, the churchwardens, overseers, and some other inhabitants of the parish, had entered into a written agreement with the plaintiffs, that in consideration of the plaintiffs erecting a new cupola, clock, and bell to the church, the ringing of the church-bell at five o'clock in the morning should be discontinued for the lives of the plaintiffs and the survivor of them; and the plaintiffs having performed their part, by erecting the cupola and bell, Lord Macclesfield granted an injunction to restrain the defendants from permitting the ringing until the hearing of the cause, and at the hearing the injunction was continued during the lives of the plaintiffs and the survivor of them.

And where two persons being in partnership as coachmasters, running coaches from Reading to London, one sold his share to the other, and covenanted not to run any coach from Reading to London, or so as to injure the remaining partner in his business, and then he commenced running a coach from Pangbourne, six miles beyond Reading, to London, passing through Reading, an *ex parte* injunction was granted to restrain him from running any coach from Reading to London(c).

(a) Eden on Injunctions, 308.

(b) 2 P. Wms. 266.

(c) *Williams v. Williams*, 2 Swans.
253.

2. In suits for the specific performance of agreements for the sale of land, injunctions are frequently granted: thus in a suit of that nature, instituted against the vendor, an injunction will be granted to restrain him from conveying the legal estate, on the ground that the plaintiff might be put to expense by the necessity of making another party when the cause might be just ready for hearing (*d*). So where there was a parol agreement between the plaintiff and defendant to exchange estates, and the plaintiff had partly performed it, by purchasing the estate to be given for the defendant's, the defendant was restrained from selling his estate (*e*).

In a case of *Spiller v. Spiller* (*f*), the doctrine has, however, been laid down, that in general, on a bill for the specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with his property, as a different doctrine would operate to control rights of ownership, although the agreement should be such as could not be performed; but under special circumstances this rule will be departed from. In the case referred to, possession of copyhold premises had been delivered to the purchaser, who had paid part of the purchase-money, but the surrender, on which the remainder was to be paid, was delayed by the death of the steward, and before a surrender could be obtained the vendor became insolvent and assigned his property to trustees, and then refused to surrender the copyhold to the plaintiff: an injunction was granted till answer or further order, to restrain him from surrendering to the trustees (*g*).

Although where a vendor has not all that he contracted to sell, he will be compelled in equity so far to perform the contract as to part with what he has, making a deduction to the purchaser (*h*), yet where a large portion of

(*d*) *Fchiff v. Baldwin*, 16 Ves. 267.

(*e*) *Curtis v. Marquis of Bock*, 3 Ves. & B. 168.

(*f*) 3 Swanst. 556.

(*g*) *Spiller v. Spiller*, 3 Swanst. 556; and see Sug. Ven. & P. 9th edn. 217.

(*h*) *Hill v. Buckler*, 17 Ves. 324.

the estate cannot be conveyed, that is not allowed ; and, therefore, where three persons contracted to sell a lace manufactory, believing themselves to be entitled to it, and it turned out that another, who was not privy to the contract, had title to seven-sixteenths, besides a lien for 10,000*l.* on the entirety, the Court refused, in a suit for specific performance, to grant an injunction to restrain the defendants from selling the property to any one else (*i*).

On a motion by a vendor, plaintiff in a suit for specific performance, for an injunction to restrain the purchaser from bringing an action to recover his deposit, the Court will, if it appear that the defendant has a just claim, order the deposit to be paid into Court, not as a relief to the defendant, but as a condition annexed to the relief granted to the plaintiff. And even where the defendant has neglected the proper opportunity for doing so, and has not raised the question on the motion for an injunction, the Court will still hear an application on his part for payment of the money into Court, treating it as in principle a motion to dissolve the injunction, unless the money is paid into Court. But such a motion will be refused, if on the merits it appears that it is the default of the defendant himself, that the plaintiff retains both the estate and the deposit (*k*).

3. The Court will sometimes interfere by injunction to support as an agreement in equity an instrument which would have no effect at law; and will even, under special circumstances, give effect to an executory agreement against the legal effect of a legal instrument. Thus where a person having a lease for years agreed with another by a memorandum, in consideration of 40*l.*, to let to him &c. at 40*l.* per annum, to be paid quarterly, with a proviso interlined that the lessor should not raise the rent nor turn out the lessee so long as the rent was paid quarterly, and that in

(*i*) *Wheatley v. Slade*, 4 Sim. 126.

(*k*) *Wynne v. Griffith*, 1 Sim. & Stu. 147.

case of removal, the lessee should be at liberty to receive the said sum of 40*l.* of the next tenant. The lessor succeeded in an action of ejectment, the Court of law treating it as a tenancy from year to year. But Lord Eldon agreeing that as a lease it could only be a parcel lease from year to year, treated it, looking at the executory character of some of the stipulations, as an agreement, and said the lessor was bound at least to pay the 40*l.* consideration, or to execute some lease that would put the plaintiff in a position to recover the 40*l.* consideration at law, and continued an injunction on terms (*l*).

And in a case where the plaintiff, having a sum of money in his hands belonging to the defendant's testatrix, gave her a promissory note for it with interest, and alleged that afterwards an agreement was entered into for payment to her in lieu an annuity, and made payments on account of such annuity, but no deed was ever executed; the Court doubted at first whether such an executory agreement could be set up against the legal effect of the note, but at length supported an injunction till the hearing, on the money being paid into Court (*m*).

Where a party has entered into a contract which is still continuing, the Court will not deal with it so as to prevent any person from infringing it, except in certain cases, as in an ordinary case for specific performance. There are many cases of contract, the breach of which will entitle a party to an action for damages, but will not entitle him to come into a Court of equity. To the latter class of cases belong all those where the breach of contract does not produce irreparable mischief. And though the Court will interfere in a case of irreparable damage, so as to put it in a fair course of trial, yet unless there is something like that, though parties may be entitled to damages, and large damages too, it is not a ground upon which they can come into a Court of equity (*n*).

(*l*) *Essex v. Warrice*, 11 Ves. 150,
409.

(*m*) *Daily v. Catcliffe*, 4 Pr. 147.
(*n*) 1 Jac. & W. 370.

4. An injunction will be granted on bill filed and affidavits before appearance, and without notice to the defendant, to restrain breach of covenant in a lease secured by forfeiture and a penalty, where the affidavits make out a clear case of breach of the covenants by repeated acts (*o*). But where the answer on coming in showed that the lessor had been cognizant of the breaches, as for instance where it appeared that the lessors had been aware for eleven years of the acts done, and thus permitted the covenant to remain an ineffective part of the lease, the Court, although satisfied that the acts were within the covenant, dissolved the injunction on the ground of acquiescence (*p*).

If a lessee under a covenant to repair, reasonable wear and tear excepted, takes down things subject to the covenant before they are worn out, and substitutes new ones in their place, such substituted things are subject to the stipulation affecting the old ones. Thus where a lessee of a mill, with the steam engine, boilers, and gearing, &c. attached thereto, covenanted to keep the same in good repair, reasonable wear and tear excepted, and while such machinery was still fit for use, he pulled down the greater part of it, and put up in its place other more powerful machinery, an injunction was granted to restrain the assignees of the lessee, who had become a bankrupt, from removing the new machinery (*q*).

5. Where parties convey their estates in trust for the payment of creditors, without any creditors being parties, or any agreement with, or release, or other consideration moving from creditors, but it is simply a voluntary deed, a creditor under such deed cannot restrain the trustees of a subsequent deed, varying the dispositions of the first, from carrying such second into execution; for the grantors may vary the trusts of the voluntary deed as they please (*r*).

(*o*) *Barret v. Blagrove*, 5 Ves. 555; and 6 Ves. 104.

(*p*) 6 Ves. 104.

(*q*) *Sunderland v. Newton*, 3 Sim. 450.

(*r*) *Wallwyn v. Coutts*, 3 Mer. 707.

6. An injunction will be granted to stay proceedings in an arbitration under circumstances. In *Mylne v. Dickenson*(*r*), the plaintiff had agreed for the purchase of a patent, represented as very profitable by the defendant; pending some difficulties in concluding the contract, the defendant having received an order from the Navy Board for certain of the patent articles, the plaintiff paid him 3,000*l.*, and the differences were referred to arbitration; the defendant then wrote to the Navy Board, saying that he had changed his opinion of the utility of the invention, and had therefore disposed of the patent. Under these circumstances, the plaintiff filed a bill to have the 3,000*l.* returned, and to set aside the contract; and for an injunction to stay the arbitration. The Court granted it, on the ground that the arbitration was part execution of the agreement, which it was the object of the bill to set aside.

7. Although equity interferes by injunction to restrain breach of agreement, where it is such that the Court sees that a decree for a specific performance of the *whole agreement* might be made; and although the Court can execute a negative agreement, where it is simply such, standing by itself(*s*), yet it has been laid down, that where an agreement is mainly and substantially of an active nature, and is so undetermined and loose in its provisions, that it is impossible to have a specific performance of it decreed, and it is only guarded by a negative provision; equity will leave the parties to a Court of law, and will not give partial relief by enforcing, through the means of an injunction, the negative stipulation(*t*). This doctrine was acted upon in two cases before Sir L. Shadwell, V. C.: in *Kemble v. Kean*(*u*), the plaintiff Kemble and other parties, who were the proprietors of Covent-garden Theatre, had agreed with the defendant Kean, the actor, that he should perform at Covent-garden a certain number of nights, at a given rate of remun-

(*r*) Coop. 195.

(*s*) 6 Sim. 351.

(*t*) 6 Sim. 338.

(*u*) 6 Sim. 333.

neration ; and the agreement contained a prohibitory clause, that the defendant should not, during the period above-named, perform at any other theatre. His Honor the Vice Chancellor held that the positive agreement was of such a nature, both in respect of the difficulty of compelling a man to act, and the looseness of the terms of the agreement, that the Court could not compel performance of it ; and upon the principle above stated, of not giving partial relief, refused to restrain the defendant from committing a breach of the negative part of the agreement.

In *Kimberley v. Jennings* (x) the same point arose. There an agreement was entered into between A. and B. copartners, with C. to be their book-keeper, clerk and traveller during six years, at certain progressive rates of salary, with a covenant on the part of C. during the said term of six years, “ not to work for, or for the use or benefit of, or otherwise to be engaged or employed by any other person or persons than the said A. and B., or the survivor of them, in the said capacities, or in any other trade or business, profession or employment whatever, without the licence or consent of A. and B., or the survivor of them ;” but C. was liable to be dismissed for ill conduct or ill health. There was also a clause in the agreement, that at the end of the six years the said parties should be and become partners, upon such terms, conditions, and restrictions as should be mutually agreed upon between the said A. and B. and C. The bill prayed an injunction to restrain C. from working for any other person, or at any other trade, on the ground of the restrictive clause of the agreement. It was held by the Vice-Chancellor that the whole of the agreement must be taken together ; and that so taking it, it was not such an agreement as the Court could perform on the whole, and therefore the Court could not perform any part of it ; and his Honor refused to restrain the defendant C. from entering into any other employment. There were, however, other points, on which the Court

(x) 6 Sim. 340.

said it was not a case for the interference of equity. One way, that it was a hard bargain; and another, that the agreement was not, according to the view taken by the Court, that the clerk C. should not enter into any other employment, whether discharged or not; but taking the clause binding him to serve A. and B., and the clause restricting him from taking other employment, in connection, that he was not to take other employment *quandiu* he was in the employment of A. and B.

Again, in a very late case, where a society had agreed with a publisher to furnish him with drawings of maps, to be exclusively published by him, the publisher to pay to the society a certain sum for every 1000 copies sold over and above 8000, Sir L. Shadwell refused a motion by the publisher to restrain the society from publishing some numbers of such maps. His Honor put his refusal on this among other grounds, that as he could not compel the society to furnish the plaintiff with drawings, he would not grant the injunction, which is merely ancillary to what the Court may do at the hearing of the cause (y). The Court has also refused to interfere indirectly, where the agreement was altogether positive, and of such a nature that it could not be directly enforced. This was the case of *Clarke v. Price*, where the defendant, a barrister, agreed to compose and write reports of cases for the plaintiff, but entered into no covenant that he would not write for any other publisher; and afterwards he entered into an agreement with another publisher to compose reports for him. Lord Eldon said he had no jurisdiction to compel Mr. Price to attend the Court to take notes of cases, and could not therefore indirectly compel him, by restraining him from publishing, unless he employed the plaintiff as his publisher (z).

And here may be mentioned also a case of *Smith v. Fromont*. In that case the defendant, being the owner of coaches running from London to Bristol, sold to the plaintiff the working of the coaches on a part of the road, the

(y) *Clarke v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393.

(z) *Clarke v. Price*, 2 Wils. 157.

plaintiff providing horses, and profits being divided in a given ratio. After a time, the plaintiff fell into embarrassments, and his horses were seized, and it was then agreed that until the plaintiff should again be able to provide horses, the defendant should do so. The plaintiff afterwards provided horses, but the defendant continued to employ his own. Lord Eldon refused an injunction, on the ground that if he enjoined the defendant from bringing horses to convey the coaches within the limits in question, he must indirectly compel the plaintiff to bring horses there, by enjoining him from not bringing them (*a*).

On the other hand it is to be observed, that in the case of *Kemble v. Kean* (*b*) already cited, Lord Lyndhurst had granted an *ex parte* injunction, restraining the defendant from acting at Drury Lane or any other place in London, until he should have acted the stipulated number of nights at Covent Garden (*c*).

And in *Morris v. Colman* (*d*), where the question was whether Morris and Colman being partners in a theatre, under an agreement containing a clause that Colman should not write dramatic pieces for any other theatre, the Court could interfere to restrain Colman from so writing; Lord Eldon granted an injunction against him.

However, in *Kemble v. Kean*, his Honor the Vice-Chancellor seems to have considered that the motion for an injunction before the Lord Chancellor being *ex parte*, his Lordship had not expressed any opinion on the point; and with regard to *Morris v. Colman*, his Honor, referring to what fell from Lord Eldon in *Clarke v. Price* (*e*), treated the decision in that case as grounded on the circumstance of there being a partnership subsisting between the contracting parties. On the whole it would seem that the point can hardly be thought entirely free from conflict of authority (*f*).

(*a*) *Smith v. Fromont*, 2 Swanst. 330.

(*e*) 2 Wils. 164.

(*b*) 6 Sim. 333.

(*f*) See also on this class of cases,

(*c*) 6 Sim. 334.

2 Story's Eq. Juris. 2d edit. 204 n.

(*d*) 18 Ves. 437.

8. It seems settled that equity has not jurisdiction to compel on motion the performance of a substantive act, such for instance as the removal of a work already executed, even although it may have been executed in contravention of an express agreement. But in a certain class of cases, all the results which would be obtained by the jurisdiction to order a substantive act to be done, may be obtained on a motion for an injunction, by framing the order in an indirect form. Thus, although if A. has built a work, which in equity and good conscience he ought not to have built, the Court will not actually order him to pull it down, it will restrain him from allowing it to remain in its existing state; or, if it be connected with the execution of any collateral work, will restrain him from continuing such collateral work, until he has removed the principal one. The effect is, of course, that he is compelled as effectually to remove it as if he were specifically ordered to do so.

This practice was first resorted to in *Robinson v. Lord Byron* (g), and *Lane v. Newdigate* (h), and has been since followed in several other cases. *Robinson v. Lord Byron* was not a case of contract. In that case the plaintiff had a mill, the stream for supplying which supplied also the defendant's ponds; and it was alleged by the plaintiff that the defendant had at one time entirely stopped the water, and at another let in such large quantities as to endanger the mill. The Court said that it could not enjoin what had been used for twenty years past, but if it was so enjoyed as to do mischief, the Court would interfere; and an order was made to restrain the defendant from using dams, weirs, shuttles, floodgates, and other erections, otherwise than as he had used them before a particular time, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before that date. The defendant was therefore, in effect, compelled to remove such dams, weirs, &c. as he had constructed, if they impeded the flowing of the water in the manner prescribed by the order.

(g) 1 Bro. C. C. App. 588.

(h) 10 Ves. 192.

In *Lane v. Newdigate*(*i*) the plaintiff was assignee of a lease, granted by the defendant for the purpose of erecting mills, and the defendant was by the covenants bound to supply water from canals and reservoirs on his own estate, to work the plaintiff's mills; reserving to the defendant the right of using water for works of his own. The bill prayed generally that the defendant might be decreed to use and manage the waters of the canals so as not to injure the plaintiff in the occupation of his manufactory. But the point on which the difficulty arose was the prayer that the defendant might be decreed to *restore* a certain cut, and a certain stop gate, and to restore the banks of the canal to a given height, and to *repair* certain works which were in existence at the granting of the lease, and to *remove* certain locks made since the granting of the lease; Lord Eldon doubted whether he could decree or order repairs *to be done*, or a work to be *restored*. But ultimately made an order, by which the defendant was restrained from impeding the enjoyment of the plaintiff by *keeping the works out of repair*, and from preventing such his enjoyment by the *use of any locks* erected by the defendant, or by *continuing the removal* of a particular stop-gate(*j*).

The principle of *Lane v. Newdigate* was adopted in *Rankin v. Huskisson*(*k*), where the Commissioners of Woods and Forests had, under the 7 Geo. 4, c. 77, entered into an agreement with a club for granting to them a lease of part of the site of Carlton House to build thereon a club house; and it was part of the agreement that a part of the said site adjoining to the part to be let, should be laid out as an ornamental garden, and no build-

(*i*) 10 Ves. 192.

(*j*) The objection to this form of order does not appear to have occurred to the counsel who argued the case, that, perhaps, strictly speaking, when a certain thing has been removed, its

removal is not anything in an existent state, but a mere past fact, and that therefore it must be incapable of being actively continued.

(*k*) 4 Sim. 13.

ings erected thereon. The club built under this agreement a club house, and then the Commissioners permitted the defendants Harkness and Lawley to commence building stables on the plot of ground agreed to be laid out as an ornamental garden. Sir L. Stowell restrained the prosecution of such buildings, or the erection of any others, and indirectly compelled the removal of the building already commenced, by making an order restraining the defendants from *permitting* such part of the said building as had been already erected on the part of the site agreed to be laid out as an ornamental garden, *from remaining thereon until further order*. Again, in a very late case⁽¹⁾, the same point occurred. In that case a railway company, in case it should require, in the prosecution of its works, to cut through or otherwise render impassable or inconvenient any road, was bound, before any road "should be so cut through, raised, sunk, taken, or injured as aforesaid, to cause another good and sufficient road as the case might require, to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, sunk, taken or injured as aforesaid, or as near thereto as might be."

The railway company, in the prosecution of its operations, cut through a particular street, so as entirely to prevent the passage of carriages and horses through it, without previously making instead thereof any other convenient road; whereby the plaintiff, a livery-stable keeper and coach-master, was compelled to take his carriages and horses round some distance through a very difficult and dangerous road, and had in consequence lost nearly the whole of his business. The prayer of the bill was, among other things, that the company might be decreed to make and set out a proper road or communication for horses and carriages and passengers along the street in question, so

(1) *Spence v. London and Birmingham Railway Company*, 8 Sim. 193; 1 Rail. Cas. 159.

as that convenient access through it for horses, carriages and passengers might be made; and that in the meantime the company, their servants and agents, might be restrained from cutting through or injuring, or *from continuing to cut through, stop up and injure the horse and carriage road* leading through the street to the public road.

The defendants demurred generally to the bill, and one of the grounds on which the demurrer was argued was, that the Court had no jurisdiction to compel parties to take active measures. On this point the Court said, "The power of the Court to grant that species of injunction which Lord Eldon granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognized and acted upon; and I do not see why, if that species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties from *continuing the excavation in its present state*, and from making the excavation greater. The injunction asked for so far as it restrains the defendants from widening the excavation, is quite of the common sort, but so far as it seeks *to prevent its continuance* it is of a negative kind; but it has been adopted by Lord Eldon." His Honor accordingly overruled the demurrer, and afterwards granted an injunction (*m*).

9. Although however this jurisdiction may be considered now too firmly settled by authority to be shaken, it has not met with unqualified approbation. In *Blakemore v. The Glamorganshire Canal Company*(*n*), Lord Brougham appears with reluctance to have admitted the existence of the jurisdiction, while he refused to exercise it, chiefly on the principle laid down by Lord Eldon in *Attorney-*

(*m*) 1 Rail. Cas. 170. The Lord Chancellor on appeal discharged the order for an injunction on special grounds, putting the company on

terms, but did not repudiate the principle of the Vice-Chancellor's decision.

(*n*) 1 My. & K. 154.

General v. Cleaver(*g*), with reference to the great extent of mischief that might be caused by compelling the defendants either to suspend their navigation altogether, or to restore their works, if that were practicable, to the state and condition in which they were many years before. In the case before Lord Brougham, the injunction prayed was among other things to restrain the canal company from "continuing" a certain communication and basin of greater depth than they were in the year 1798, and from "allowing the bottom and sides of the canal to remain not sufficiently puddled and secured," and from "continuing to leave" certain other works "out of repair," &c. This would have been an order plainly framed on the principle of *Lane v. Nardigate*, to compel the parties to do certain substantive acts, such as diminishing the size of the basin, repairing the works, or puddling the bottom and sides of the canals, under the pretence of restraining them from allowing such works to remain in a state in which those things were undone; and as to so much of the order, the Lord Chancellor refused to exercise the jurisdiction of the Court, saying, "the leading principle on which I proceed in dealing with this application, the principle which as I humbly conceive ought generally speaking to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is that only such a restraint shall be imposed as may suffice to stop the mischief complained of; and where it is to stay further injury, to keep things as they are for the present (*p*)."¹ So in *Milligan v. Mitchell*(*q*) his Lordship refused to make an order to restrain certain trustees of a Presbyterian Church from preventing any person, being a licentiate or minister of the Scotch church, from officiating or conducting public worship there. As to that his Lordship said, "he should not extend the power which this Court, in cases of a peculiar nature, has some-

(*g*) 18 Ves. 211

(*q*) 1 My. & K. 446.

(*p*) See 1 My. & K. 185

times exercised, of ordering a thing to be done under the form of restraining parties from preventing it."

Lastly, in a very late case(*r*), where a railway company had partly constructed a viaduct over a public street, which the plaintiff alleged was not according to the act of parliament, and an injunction was asked, not only to restrain the company from proceeding with the building, but to restrain them from suffering that which was already constructed to continue, Lord Cottenham said, that undoubtedly it would be an *extraordinary interposition* of the Court to order an erection of that nature to be removed, and on the ground that the plaintiff had to a considerable extent acquiesced in the progress of the work, held that there was no case made for such extraordinary interposition; although, from the order made by his Lordship, it is clear that he thought the same circumstances afforded ground for an injunction to restrain further proceedings with the building. His Lordship does not however seem to have disputed the existence of the jurisdiction.

10. On the whole I submit to the learned reader that as regards the doctrine under discussion, the authorities establish two points: I. That the Court *has jurisdiction* to compel the defendant, by means of an injunction specially worded, to do a substantive act, such as removing buildings already erected, or the like. But,

II. That the Court will not at the present day carry the jurisdiction further than it has already been carried, and will rather be astute to find reasons for refusing than for consenting to exercise it.

11. Before concluding this part of the subject it may be observed, that the Court asserts no jurisdiction even by a circuitous mode to compel a party to carry on a business, though it may under circumstances have jurisdiction to

(*r*) *Attorney-General v. Manchester and Leeds, Railway*, 1 Rail. Cas. 436, 451.

prevent him from dealing with his property so as to preclude himself from carrying on a business, and thereby from fulfilling his covenants as a lessee. The Court will, therefore, under circumstances, restrain a sale by the lessee of an inn, of his fixtures and furniture; but will not restrain him from discontinuing to keep the house open as an inn (5).

12. Equity will interfere by injunction in many cases where a party is bound by a trust actual or implied; or where one person stands in such a relation to another as to be invested with something of a fiduciary or confidential character; or where without either being bound by a trust properly so called, or filling a character of itself implying confidence, a person has *de facto* a confidence reposed in him.

I. Thus where a church was vested in trustees to be used as a place of religious worship for Christians of the Scotch Presbyterian Church, and the office of minister being vacant, a portion of the trustees employed as a temporary measure lay persons and other persons not duly qualified, to preach; and had so conducted themselves, and continued so to conduct themselves as to evince an intention to elect a person to be minister, not regularly a licentiate or ordained minister of the church of Scotland; an injunction was granted, on the ground of contravention of the trust, to restrain the election of a person to be a minister of the church, who should not be regularly licensed as a preacher of the church of Scotland; while it was refused as to restraining the temporary employment of persons not so licensed, to preach (1).

II. On the ground of implied trust.—In a case where the steward of a nobleman received large sums from the rents of his master's estate, of which he rendered no account for

(5) *Hopier v. Broderick*, 9 Law Journ. 321

(1) *Milligan v. Mitchell*, 1 My. & K. 446.

a great many years, but purchased stock in his own name to a very large amount, and it appeared that some of the stock was purchased with his own money ; Lord Eldon granted an *ex parte* injunction to restrain the steward from transferring any part of the stock until answer, saying, "that as the mischief to the defendant in granting the injunction as to the whole, arose from his own wrongful act in mixing it, he should do less mischief by fixing the injunction on the whole till the defendant informed the Court what was his master's, than by not fixing the injunction on any part, giving the defendant the opportunity of doing the enormous injustice, of which, by the affidavits, he appeared capable (*u*)."

But where the deed declaring the trusts of a dissenting chapel was silent as to the mode of electing the minister, and as to the duration of his office, and a minister was elected according to the custom of the particular sect ; the Court held, that if at a subsequent meeting regularly held by the members of the church pursuant to their customs, the minister first elected was deposed and another elected in his place, it had no jurisdiction to restrain the second from officiating, or the members of the congregation from impeding the first in officiating (*x*).

The dealings between a tradesman and his customers may in like manner become the subject of equitable interference and account, where there is something which the Court can fasten upon, such as fraud and imposition on the inexperience or imbecility of the customer (*y*) ; but not where the case is one mainly of improvident orders complied with by the tradesman, and no refusal at any time to deliver accounts ; and therefore in a case where the plaintiff had given securities to the extent of 7000*l.* to the defendant, a coach-maker, for articles supplied in the way of his trade, although the case was one of gross improvidence, yet as bills had been regularly delivered and might have been questioned

(*u*) *Lord Chedworth v. Edwards*,
8 Ves. 46.

(*x*) *Porter v. Clarke*, 2 Sim. 520.
(*y*) 9 Ves. 474.

at any time, the Court would not, after the account had been suffered to remain uninvestigated for several years, restrain the sheriff from selling goods taken in execution by the defendant upon judgments under those statutes (2).

III. On the ground of the party filling a character in itself fiduciary or confidential, or being *de facto* the depository of confidence, the Court interferes in many cases to restrain a solicitor who has been employed by one party, from acting for another against his former client. Thus in *Cholmondeley v. Clinton* (a), Lord Eldon decided in conformity with the opinions of all the judges and the barons of the exchequer, as well as of the Master of the Rolls and Vice-Chancellor, that a solicitor employed for A., in a cause between A. and B., cannot be permitted voluntarily to quit the service of A. and act as the solicitor of B. in the same cause. In *Briehens v. Thorpe* (b), an endeavour was made to extend the principle of this case so far, as to prevent a person who had been clerk to the solicitor of the plaintiff during the progress of a suit, and who had since been admitted a solicitor and commenced practice, from acting as the solicitor of the defendant; but Lord Eldon refused to act upon so wide a principle, and said, "the argument goes to this extent, that if a gentleman has been five years a clerk, and in that period happens to have to deal with the causes in which his master is employed, that he cannot afterwards become solicitor for any of the parties against whom his master was employed." His Lordship said, he thought that would be going very far, and that before thus shutting up the means of employment, it was incumbent on the Court to see that there was something more than hypothetical mischief to be guarded against, and he refused to make the order in the absence of allegations of particular mischief to the plaintiff from the employment of the party objected to. But though it

(2) *Lara Courtney v. Godschall*, 9 Ves. 473.

(a) 19 Ves. 251.

(b) Jac. 306.

seems that the Court will not restrain a solicitor any more than counsel from acting against his former client, simply on account of the relation which has subsisted between them(c), yet where a solicitor has been engaged for his client in carrying through an agreement, in the progress of which he has acquired as solicitor a knowledge of matters concerning the validity of the agreement, he will not be permitted afterwards to act as solicitor for the plaintiffs in a suit instituted by them for the purpose of setting aside that very agreement; nor to communicate to such plaintiffs any information relating to the agreement which came to his knowledge confidentially as the solicitor of his former client; and if he have a partner, such partner will also be restrained from acting as solicitor in the suit, although he may not have joined the partnership till after the transaction relating to the agreement took place(d). An injunction will not, however, be granted to restrain a solicitor from disclosing matters come to his knowledge respecting the rights of parties by whom he has been employed, by giving evidence in judicial proceedings or otherwise; for that would amount in effect to saying, that the Court of Chancery will not trust other Courts with the consideration of whether he ought or ought not to answer a question put to him, as to which the Court of equity knows nothing(e). But if a solicitor having been discharged by his client becomes the solicitor of that client's opponent in a suit, he ought not to give up papers of his former clients placed in his hands by them, to any one but such clients; and on a motion properly made, he might, perhaps, be ordered to give them up again(f). So an accountant employed by solicitors will be restrained from disclosing or making use of information obtained by him in the course of his confidential employment by them(g).

And where a guardian, after the majority of his ward,

(c) Jac. 304.

(f) Jac. 82.

(d) *Davis v. Clough*, 8 Sim. 262.

(g) *Evitt v. Price*, 1 Sim. 483.

(e) *Beer v. Ward*, Jac. 77.

continues the management of the ward's property, although at the request of the ward, he cannot be permitted to separate the accounts subsequently from those antecedent to the majority, and will be restrained by injunction from bringing an action to recover an alleged balance on the accounts since the majority; on the plaintiff, the ward, paying such balance into Court. But sums forming part of such balance were to be advanced personally to the ward after majority, and that part not denied by the ward, will be ordered to be paid immediately to the guardian (*k*).

13. On the principle of the implied trust between solicitor and client, the Court refused to order the papers of clients of a firm to be delivered by one of the partners to another, without the consent of the clients. And where two solicitors carried on business as co-partners, and one became bankrupt, and the assignees possessed themselves of the books and papers of the partnership, and excluded the other partner from all interference in the affairs of the partnership, the Court refused to order the assignees to deliver up the papers of clients to the solvent partner, without the consent of those clients (*l*).

A solicitor's right by way of lien on his client's papers and securities in his hands, does not extend to entitle him to an injunction to restrain that client from bringing actions against the parties liable under such securities, if the action can be brought otherwise than through the medium of the actual instruments themselves; nor to restrain him from receiving the money secured by them (*k*).

14. An attempt was made in a very late case to claim the interposition of the Court against the employment of particular counsel, on special grounds of alleged impropriety. The case was, that a particular counsel, who had

(*k*) *McCook v. McCulloch*, 1 Sid. & 297.
Sta. 138.

(*l*) *Spalding v. Webb*, 4 My. & Cr.

(*i*) *Darbyson v. Napier*, 1 Sim. 346.

advised the defendants in a suit, and drawn the pleadings on their behalf, being afterwards promoted to the rank of king's counsel, received a retainer from the plaintiffs, and the defendants moved to restrain him from acting as the plaintiff's counsel. The Court said, that as the defendants had not taken the usual means of securing the professional assistance of the particular counsel, it could not interfere. And it seems doubtful whether the Court has any jurisdiction to interfere in questions arising on the practice of retainer (*l*).

15. It appears by a very late case (*m*), that the Court will not interfere against a legal title, where there is even a doubt established whether the equity set up against it is subsisting. It is not necessary to show that such equity is absolutely displaced. But if the application is not to assist an equitable against a legal title, but as between parties both claiming only equitable titles to restrain the party in possession of an equitable title from acting under it, then equity will not so interfere on a merely doubtful state of that equitable title (*n*).

16. In the case first referred to (*o*), the trustees of a dissenting chapel and minister's dwelling-house had brought an ejectment against the minister to obtain possession of the trust premises. The congregation was of a denomination whose custom is, that none but communicants at the Lord's table have any voice in the management spiritual or temporal, and a majority of the communicants decides. A meeting of the body at large, at which a majority of the communicants was not present, prepared a letter, which was afterwards signed by a majority of the communicants, to the minister, *requesting* him to *tender his* resignation. This he disregarded, and a meeting was afterwards held of

(*l*) *Baylis v. Grout*, 2 My. & K. 316; 19 Ves. 276.

(*n*) *Leslie v. Birnie*, 2 Russ. 114.

(*o*) *Attorney-General v. Aked and*

(*m*) *Attorney-General v. Aked and others*, 7 Sim. 321.

others, 7 Sim. 321.

the trustees, seat-holders generally, and communicants, at which a majority of the latter did attend; and there a resolution was passed, that it was the opinion of the meeting that the minister ought to resign. He still refused, and on this an ejectment was brought; and Sir L. Shadwell, V. C., refused an injunction to stay the proceedings at law. It must be observed, that by this decision, his Honor did not at all decide whether the notices to the minister were such as to amount to a legal dismissal; but only that they were not so clearly inequitable as to call for the interference of the Court to prevent the trustees from proceeding on their legal title. The decision is therefore not inconsistent with *Leslie v. Birnie* (p). In that case a chapel was vested in trustees, in trust for the congregation, who were of the Scotch Presbyterian persuasion; the congregation consisting of the minister, elders, *members*, and seat-holders. A vacancy occurring in the office of minister, a minister was elected by the *members*, that is the communicants, excluding the mere *seat-holders*, and it was not clear by the evidence whether *seat-holders* had or not voted usually in the election of a minister. Lord Eldon refused on this state of circumstances to restrain the minister from preaching, chiefly on the ground that no objection being made to his character and doctrine, the propriety of his election could not be determined on motion.

Of course parties claiming under a trust, and asking the interference of equity on their behalf in respect of such title, must clearly show the continuance of their title under it. Therefore where lands were demised to trustees, on trust for persons being a congregation of a particular persuasion, and the minister elected by the general body secede with a majority, and join another congregation not following the same persuasion or subject to the same discipline, it was held that the seceders were not the congregation for whose use the premises were in-

tended, and the minister failed in sustaining an injunction to stay ejectment brought by the trustees to turn him out of the chapel and dwelling-house (*q*).

17. An agreement to give a right is impliedly an agreement to do nothing inconsistent with the enjoyment of such right. On this principle, if the owner of grounds grants a way-leave or wagon way over them to the lessees of adjoining collieries, and then grants a right to use such way leave to another party, who contracts with the parties having the right to the materials of the wagon way for their permission; although these latter parties might at any time remove such materials, yet, if the owner of the land over which it passes, afterwards acquires the right of making his grant effectual by taking an assignment of the materials of the wagon way, *he* will be restricted from removing them, as that would be defeating his own grant (*r*). *A fortiori*, equity will interfere if the covenant is express. Thus, where an author composing a work for a publisher, covenants in strong terms that he will not write or publish any abridgement of his first work, or publish any other work injurious to its sale, he will be restrained on the ground of that covenant from publishing another work on the same subject, containing much of the matter contained in the original work, although there may be great doubt on the question of infringement of the copyright of the first. This point arose in the case of *Barfield v. Nicholson* (*s*); the defendant, Nicholson, had composed, under a contract containing a covenant on his part of the character above mentioned, an architectural work for the plaintiff, in which were many figures proved to have been already published in other works. Nicholson then undertook a new work

(*q*) *Broom v. Summers*, 10 Law Jour. N. S. 71.

(*r*) *Newmarch v. Brandling*, 3 Swans. 99.

(*s*) 2 Sim. & Stu. 1; and see 4

Russ. 356, for the grounds of the determination of the Lord Chancellor. The case is there reported under the name of *Barfield v. Kelly*.

for the other defendant Kelly, containing many of those figures; and he swore that he did not take the figures from his first work, but from the original sources. On this state of things, the Vice-Chancellor was of opinion that there was no copyright in the first work, and therefore that even if the second had been taken from the first, there would have been no ground for an injunction on the mere ground of copyright, and accordingly dissolved, as against Kelly, an injunction which had been obtained *ex parte*; but sustained it on the ground of the covenant against Nicholson. The Lord Chancellor, however, on appeal, held, that Kelly having notice of the covenant entered into by Nicholson, was bound by it; and sustained the injunction against Kelly as well as against Nicholson, so far as to restrain Kelly from using the name of Nicholson, in aid of the publication of the second work. But in order to sustain an injunction against a party thus affected by the covenant of another, there must be allegation and proof that he has published in infraction of the covenant, after he had notice of it (1).

18. It is well known that in matters of agreement time may be of the essence of the contract, so that if that which is contracted to be done is not done within the specified

211. In *Birchfield v. Kelly*, the plaintiff, at the hearing of the cause, lost the injunction and account against both the defendants, by a singular combination of the slave rule with the rules of evidence. Nicholson, by his answer, insisted that the covenant was a fraud upon him, but Kelly, by his answer, did not impeach its validity. The plaintiff had not entered into evidence, and was not allowed to prove the deed *sub jure* as an exhibit, as against Nicholson; and as against Kelly, although it was allowed to be proved *sub jure*, the consequence of there being no proof of it against

Nicholson, was, that Kelly had only notice of the covenant, for the purpose of making him responsible to the plaintiff, that the time of filing the bill. And thus as the original bill *could* of course contain an allegation of publication subsequent to it, and as there was no supplemental bill filed stating that fact; and Kelly, by his answer, denied it, there was nothing the Court any longer, or threat of breach of the covenant, subsequent to the time when Kelly had, upon the evidence, notice of it, and therefore the injunction and account fell.

time, the agreement shall be determined ; but the party entitled to avail himself of the forfeiture may, by acts inconsistent with such determination, lose the benefit of it in equity. Thus, where A. agreed to let to B. in consideration of a sum to be paid by bills of exchange within six months, and one of the bills of exchange not being taken up in time, the lessee wrote to the lessor, stating that he would take it up three weeks later, and the lessor made several appointments for an interview with the lessee on the subject, and after he had received the lessee's letter, left with him a notice from the superior landlord for payment of a half-year's rent ; these acts were held inconsistent with a clause of forfeiture, by which, if the lessee did not pay the whole sum within the six months, he was to deliver up possession and pay £150 ; and the Court therefore continued an injunction to stay execution in ejectment, the lessee paying into Court the money due on the bill of exchange, and giving judgment in the ejectment (*u*).

And other cases may arise in which parties will, by acts inconsistent with the due performance of an agreement, deprive themselves of the right to claim the interference of equity to enforce performance of the agreement. Thus, although the terms of a partnership agreement will be enforced if the parties have acted upon them, yet if they have departed from them ; as, for instance, if the stipulations as to taking accounts having specific reference to the conduct of the trade of ship-brokers and agents, the parties have transacted as partners other business to which such stipulations are not applicable, they will be held to have abandoned such stipulations, and the accounts to be taken in the usual way ; and in such a case the executors of a deceased partner were restrained from proceeding on a bond entered into by the surviving partners, in pursuance of the terms of the partnership, to the executors of the

(*u*) *Hudson v. Bartram*, 3 Mad. 440.

deceased partner for payment of the amount of his share, until the hearing of the case (c).

19. A person may also lose the benefit of his right to an injunction in aid of specific performance by laches. Thus, where A. purchased lands of B. and B. covenanted that he would not suffer buildings to be erected on certain land adjoining, except of a given class, and A. acquiesced in a subsequent grantee erecting further buildings in contravention of the covenant, A. then came after some considerable delay for an injunction, but Lord Eldon refused it, saying, the plaintiff must be left to his remedy at law (y).

20. It has been held that where a party lets premises with a proviso that if they should *be wanted for building*, the lessee shall deliver them up; it is not enough to resist a motion for an injunction to stay proceedings at law for the recovery of the premises, that the lessor should by his answer swear that he told the lessee he had entered into a *treaty*; that is no proof that the premises were actually wanted for building. He must shew at least that he had entered into an *agreement* (z).

But in *Gough v. Worcester and Birmingham Canal Company* (a), where there was a covenant in a lease that if *the lessor should be minded to set out any part of the premises for a street or streets, or to set or sell any part thereof to build upon*, the Court held that if he took the land with the *bonâ fide* intention of building upon it, even though afterwards he found he could not, so that the intention was not finally acted upon, that would not raise an equity for the tenant.

(x) *Jackson v. Sedgwick*, 1 Swans. 400. Russ. 18.

(y) *Roper v. Williams*, 1 Turn. &

(z) *Russell v. Coggins*, 8 Ves. 34.

(a) 6 Ves. 353.

21. Where a party has contracted with the owner of an advowson for the sale of the next presentation, and the contract not being carried into effect living the incumbent, the vendor refuses to complete after his death, the Court will restrain him from presenting, and the bishop from instituting, or in the case of a lapse pending the suit, from collating any clerk not nominated by the purchaser (*b*).

22. Where a person agreed to let farms, the leases to contain covenants for managing and quitting the premises agreeably to the manner in which they had been and should be managed and quitted by the then present tenants; and it appeared that such tenants held on under the terms of an old lease containing covenants as to the management and quitting, but in quitting the premises they broke those covenants by removing crops, &c. with the knowledge and without any objection made on the part of the landlord; the Court held that there was no ground for restraining the tenant from taking crops, &c., and otherwise acting as the previous tenants had acted in managing and quitting the premises, although such conduct was contrary to the covenants in the old lease and to the terms on which it was assumed that the previous tenants held (*c*).

23. Of course it is essential to warrant the interference of equity in aid of specific performance of an agreement by injunction, that the party against whom the relief is asked should be competent to bind himself, and should have actually done so. Therefore an agreement entered into by an infant and his father on the occasion of articling the infant to an attorney, that he shall not practise after his articles within a given distance of the place where he was articulated, and shall give a bond on coming of age to that

(*b*) *Nicholson v. Knapp*, 9 Sim. 326.

(*c*) *Liebenrood v. Vines*, 1 Mer. 15.

effect, will not be enforced against the infant by injunction after he has attained his age, where it appears that he was never applied to to confirm the agreement or to execute the bond, and he swears by his answer that he never concurred after coming of age in the covenant, and did not understand that the bond was ever intended to be enforced (*d*).

(*J. & C. Case 8, Boston, 2 Mass. 367*.)

CHAPTER VII.

Of Injunctions between Partners.

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| 1. <i>General Objects of Injunctions in Partnership Transactions.</i>
2. <i>The Partnership must be complete, to justify the Interference of Equity.</i>
3. <i>Court will not in general interfere between Partners, unless there is ground for a Dissolution.</i> | 4. <i>Where there is a parol Agreement for Partnership without specified Duration.</i>
5. <i>Of Leases to Partners.</i>
6. <i>Injunctions in Cases of special partnership Agreements.</i> |
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1. IN partnership transactions the Court of Chancery is sometimes called upon to interfere by injunction to restrain interference with or receiving the partnership funds by one or more partners ; to restrain one partner from drawing bills in the name of the firm ; to restrain one partner from excluding another from his share of management ; or generally to restrain any member of a complete partnership, from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner. Thus where one partner filed his bill against another, alleging great abuses, and the defendant was in contempt, an injunction was granted (a).

So if A., a partner in a firm, gives to his individual creditors a bill drawn or accepted by him in the name of the firm, without the consent of the partners, the creditors having knowledge of that fact, and taking it expressly on the understanding that it is to bind only A.'s share, an *ex parte* injunction will be granted to restrain A. generally from drawing or accepting bills in the name of the firm, and to restrain the creditors from negotiating the parti-

(a) *Read or Reid v. Bowers*, 4 Br. C. C. 440.

cular bill (*b*). But where cheques have been drawn on a bank under special circumstances by A., the bankers will not be restrained from proceeding at law to recover the amount of such cheques, because there was a partnership subsisting between A. and a deceased member of the banking firm, in respect of which the cheques were drawn, the surviving members of the banking firm not having been members of that particular partnership, and denying all knowledge of it (*c*).

2. But the partnership must be a complete partnership, viz. the parties must invest themselves with the character that, according to the partnership deed, they ought to have, before they come to the Court for relief. Thus in *Ellison v. Bignold* (*d*), Lord Eldon refused to grant an injunction on a bill by some of the directors of a mutual insurance company constituted by deed, against another of the directors, to restrain him from receiving money on account of the society, and from doing certain other acts, on the ground that the society had not acted upon its regulations.

3. And generally the Court will not, it seems, restrain a partner from interfering in the partnership business, and appoint a receiver, unless the partner complaining can make a case for a dissolution, although the acts done may have been exceedingly improper. All that the Court will do in such a case is to restrain the party from doing particular acts of misconduct in future (*e*). In the case referred to, various acts of misconduct on the part of the defendant were stated; in particular that he had conducted himself in a very insulting manner towards the plaintiff; that he prevented the plaintiff from inspecting the books, and had

(*b*) *Hend v. Aston*, 1 Russ. 412.

(*c*) *Askam v. Thompson*, 4 Price, 330. In this case the affidavits in support of the bill were by the plaintiffs and by their solicitor, and went to show that the defendant told the

plaintiff the terms on which he had drawn the bill.

(*d*) 2 Jac. & W. 503.

(*e*) *Goodman v. Whitmore*, 1 Jac. & W. 589.

sold goods at an under price, and exchanged others for household furniture for his own use ; and that although the business had been going on, no entries of any receipts or payments had been made for a considerable time, but that the defendant kept the accounts on small scraps of paper, and refused to enter them in the books. The Court however refused to grant an injunction in general terms to restrain him from collecting the partnership debts and effects.

Indeed it seems doubtful whether the Court will interfere in cases of breach of covenant of partnership articles, unless the breach is such as to entitle the party to a dissolution of the partnership. In a case of *Marshall v. Colman* (*f*), the breach was, that of four partners, two had written numerous letters, and given receipts in their own names only as A., B. & Co., in contravention of a covenant in the partnership deed, that all such instruments should be in the four joint names. The breach had not been continued for any considerable time, and the bill did not pray a dissolution ; an injunction was refused by Lord Eldon, without costs. It is to be collected, however, from the language of the Court, that such a breach of covenant, committed with a studied, intentional, prolonged and continued inattention to the application of the party calling on the other to observe the contract, would afford ground for the Court to grant an injunction, or dissolve the partnership.

In *Waters v. Taylor* (*g*), Lord Eldon laid it down that the Court does not interfere for the management of a joint concern, to restrain a partner from acting, except as incidental to a suit to wind up the concern and divide the produce. But an *ex parte* injunction will be granted against a surviving partner to restrain him from getting in debts due to the partnership, where it is sworn that he is in embarrassed circumstances, and applying the money received by him belonging to the partnership in the maintenance of himself and family (*h*).

(*f*) 2 Jac. & W. 266 ; see also 2 Ves. & Be. 329 ; and 4 Mad. 143.

(*g*) 15 Ves. 10.

(*h*) *Hartz v. Schrader*, 8 Ves. 317.

4. Where a partnership is constituted by verbal arrangement, without any proviso as to duration, it is a partnership at will, and either party may put an end to it when he likes; therefore in a case where a father had verbally agreed to take his son into partnership, the business being carried on at the father's house, the Court, even assuming it to be a partnership, refused to restrain the father from proceeding the plaintiff from returning to the house. An issue was directed to try whether there was in fact any partnership, and the jury having found a verdict that there was a partnership, the defendant gave notice that the partnership was dissolved on the day of the notice. The Court said, that such a partnership might be determined when either party thought proper: no particular length of notice was requisite, and all that could be done would be to restrain both parties from receiving the effects of the partnership determined at the date of the notice, and to appoint a receiver (*i*).

5. Where partners agree together to obtain a lease for partnership purposes, and one of them agrees in his own name alone with the lessor for the lease, concealing that fact from his partner; the firm having expended money on the premises, the executors of the deceased partner will be restrained from parting with the lease when obtained, except for the benefit of the co-partnership. But the lessor will not be restrained from granting the lease to such executors only, unless there is a proof that he knew of the agreement between the partners (*k*). So where two partners take a lease, and one dies, the other will be restrained from proceeding in ejectment, claiming by survivorship, until it appears whether there was an agreement to make it partnership property; or whether it was purchased with the money of both; in either of which cases the lease would not survive (*l*). But surviving partners of a firm will not be

(i) *Payne v. French*, 16 Ves. 49.

(l) *Ellist v. Drayn*, 3 Swanst. 406.

(k) *Ellis v. Farners*, 3 Swanst. n. (a).

restrained from using the name of the deceased partner in the trade, on the ground of its subjecting the estate of such deceased partner to the consequence of such trade; nor does the fact of such use being a fraud on the public, entitle the representative of the deceased partner to come for an injunction (*m*).

6. As partnerships are generally constituted by written instruments and with many varieties of special agreements, the question whether the Court is to interfere or not depends more frequently on the special nature of the contract, than on considerations arising out of the mere relation of partnership. Thus although in general partners have all an equal right to interfere in the management of the business, yet where by special agreement it is otherwise, as for instance, in a case where several persons constitute a company for general coach business, and the company find the coaches, and each partner is to supply a given part of the road with horses, one of the partners will be restrained at the suit of another from interfering in any manner with the coach on his part of the road (*n*).

But where by the contract the majority of the partners in a concern are to bind the minority as to the management of the partnership affairs, a dissenting partner will not be entitled to an injunction to restrain the majority from permitting another concern to use the partnership implements of trade, even although the majority should themselves have become the purchasers of such other concern, if the dissenting partner was himself a consenting party to such license before the acquisition by his partners of the new concern. This was determined in a case where the plaintiff and defendants were owners of a morning paper, and the defendants were also the purchasers of an evening paper; and the Court refused to restrain the majority of the

(*m*) *Webster v. Webster*, 3 Swanst. 490, note; see also Collyer on Partnership, 189 *et seq.* (*n*) *Anderson v. Wallace*, 2 Mol. 540.

owners of the morning paper from permitting the evening paper to use the types and other effects of the morning paper, the plaintiff himself having agreed, for a long time before the purchase of the evening paper, in permitting it to use the types of the evening paper. An injunction was however granted to restrain the defendants from publishing in the evening paper any information obtained at the expense of the morning paper, until it should have been first published in the morning paper (*o*).

A proprietor of shares in a theatre, who has, without the consent of one of his partners, demised his share, may, it seems, apply for an injunction to restrain his lessee from doing any act prejudicial to such dissenting partner (*p*).

(*o*) *Gloucester v. Theatres*, 1 Sm. (p) *Turn. & Ham*, 520.
N. Sta. 124.

CHAPTER VIII.

Injunctions relating to Canal, Railway, and other Public Companies.

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| <ol style="list-style-type: none"> 1. <i>General Principles applicable to Acts of Parliament for executing public Works.</i> 2. <i>Injunction may be granted though no irreparable Spoil or Waste.</i> 3. <i>Limitation of the Doctrine of Agar's case.</i> 4. <i>Company not protected when acting against legal Rights.</i> 5. <i>Nor permitted to assess Lands not included in their Notice.</i> 6. <i>Court sometimes refuses Injunction, putting a Company to give an Undertaking.</i> 7. <i>Injunction sustained pending Inquiry at Law, whether the Effect of Works would be materially to interfere with a Defendant's Wharfage.</i> 8. <i>Diligence in applying to the Court more requisite against a Company than in ordinary Cases.</i> 9. <i>General Result of the Cases as to what constitutes sufficient Laches.</i> 10. <i>Jurisdiction of Equity not taken</i> | <p style="text-align: right;"><i>away because an Act of Parliament gives special Remedy.</i></p> <ol style="list-style-type: none"> 11. <i>How the Court is governed as to Exercise of its Jurisdiction.</i> 12. <i>Court acts only in Aid of real or presumed legal Rights.</i> 13. <i>Course pursued where legal Title doubtful.</i> 14. <i>Court pays Attention to the Question which Party will be most injured by its Interference.</i> 15. <i>Of the Effect of an Agreement to withdraw Opposition in Parliament, where the Party retiring has been induced to do so on the Representation and Promises of the other Party.</i> 16. <i>The same Question where the Parties have been at Arms-length.</i> 17. <i>Of such Agreements with Landowners, being also Peers of Parliament.</i> 18. <i>Injunction to restrain Parliamentary Proceedings by Companies tending to alter their Constitution and Object.</i> |
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1. **AN** Act of Parliament, vesting in a company power for carrying into effect some public work, is a contract of a peculiar character between the public and the individuals

in which persons are created by the Act. A good proportion of the cases relating to public companies fall properly under one or other of the general heads of equitable jurisdiction, such as *trusts*, *specific performance*, &c. But there are some principles of jurisdiction and constitution which are peculiar to public companies acting to carry into effect public works, and which therefore require a distinct notice.

In a case before Lord Eldon (a), his Lordship said, "Where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the error is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal, can show that the persons so authorised are unable to complete their work, and is prompt in his application for relief, grounded on that fact, equity will not permit the further prosecution of the undertaking."

In *Bloomfield v. Glamorganshire Canal Company* (b), the same learned judge said, "If individuals go to parliament, and parliament, on being satisfied that the railway or canal can be made at an expense of say 100,000*l.*, closes with their application, and forms them into a company, with power to raise money to that amount, that authority is given them by parliament in the full confidence that the sum which they have asked, and obtained powers to raise, will enable them to execute the work. There is an agreement on the part of those who satisfy parliament, that they can and will do such a work for such a sum of money, and upon the faith of that understanding they get the authority to begin the work. But if they deceive parliament, what right have they to complain, if Courts of justice will not allow them to go on with the deception?"

(a) *Agar v. Hughes's Canal Com-* 1 *Str. 250.*

pany, cited by the Lord Chancellor.

(b) See 1 *My. & K.* 164.

And in a late case (*d*), Mr. Baron Alderson thus stated the general doctrine: "These Acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps more correctly they ought to be treated as conditional powers given by parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder therefore has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This, I conceive, to be the real view taken of the law by Lord Eldon in the case of *Blakemore v. The Glamorganshire Canal Company*. In Mr. *Agar's case* (*e*), (his Lordship continued) one point, it is said, was, that the Regent's Canal Company could not, for the sum which they had power to raise, complete their works; and if that were clearly made out, Lord Eldon says in the case before referred to, that a Court of equity would probably grant an injunction, and I fully accede to that proposition, in case the fact were clearly made out, and arose either out of circumstances occurring after the passing of the Act, or from a failure to raise the sum contemplated by the Act. For to take any man's land, where the whole work can never be performed, is clearly injurious to him, and a substantial breach of the condition on which the legislature granted the right to do it. So again if the *termini* were changed, and instead of proceeding to some great town or city, the canal or railway were to terminate in some obscure village, the same result would follow. But I cannot accede to the proposition, that where the contract, as far as regards the land of the complaining landowner, is exactly performed, any variation made at a distant point, and with the consent of the landowner there, and producing no real injury to the complaining

(*d*) *Lee v. Milner*, 2 Y. & Coll. 611.

(*e*) Cited *ante*, 286.

landowner, ought to be the ground for an injunction in a Court of equity, to be granted at his application. Finally, in a case which came before Lord Cottenham on appeal (*f*), his Lordship stated the principle on which the Court interferes with bodies of public functionaries to be, that so long as they strictly confine themselves within the exercise of those duties which are entrusted to them by law, the Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may make is good or bad. But if they are departing from that power which the law has vested in them, and if they are assuming to themselves a power over property which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority (*g*).

2. It is not necessary always, in order to obtain an injunction against a company, to make out a case of irreparable spoil or waste, as a consequence of its acts. From the language of Lord Cottenham in a very late case (*h*), it is to be collected that if the company exceed the powers which the legislature has given to it, the Court is not at liberty to withhold the jurisdiction assumed in *Agar v. Regent's Canal Company*, but is bound to interfere.

3. The doctrine in *Agar's* case is not however to be understood to go the length, that when an act of parliament has been passed, giving certain powers, and authorizing a body of persons to carry on certain works, then those against whose rights such works are to be carried into effect, are entitled at all events to come into equity and say they will undertake to prove that that body cannot

(*f*) *Frewin v. Lewis*, 4 My. & Cr. 249.

(*g*) *Ibid.*

(*h*) *River Dun Navigation Company v. North Midland Railway Company*, 1 Railway Cas. 135.

with the money which they have in hand, carry those works into effect, and that therefore, and immediately in that state of circumstances, the Court is to interfere. But only that where acts of parliament impose certain severe burthens on individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, then if the Court sees that the undertaking cannot be completed, and therefore that the public cannot derive that benefit which was to be an equivalent for the sacrifice made by the individual, the Court will protect the individual from being compelled to make that sacrifice under the circumstances, and until it appears that the public will derive the proposed benefit from it (*i*). Thus, where commissioners are acting under acts of parliament for the purpose of widening and improving the streets of a city, and for other purposes, and with powers to raise money by several means, they will not be restrained from going to a jury to assess the value of premises which they have given notice of their intention to purchase, merely because there is an allegation that they have not the means of paying for the premises, and because they do not produce satisfactory evidence that they will have such means (*k*).

And where commissioners authorized by act of parliament to cut a canal were unable to complete it with the sums they were authorized to raise, and were applying to parliament for further powers, an injunction to restrain them from going on *ad interim* with their works was refused, on the ground that it did not appear that they were cutting through the plaintiff's lands; that no irreparable mischief to the plaintiff was shown as a necessary consequence of the very act they were about to perform; and that as an application to parliament was pending, the proper course seemed to be to petition parliament (*l*).

(*i*) 3 My. & Cr. 444, 445.

(*l*) *Mayor &c. of King's Lynn v.*

(*k*) *Salmon v. Randall*, 3 My. & Cr. 439.

Pemberton, 1 Swans. 244.

In *Lee v. Mitton* (a) the defendants were bound by their act of parliament to make a cut not deviating more than a hundred yards from a certain parliamentary line, but they had fifteen years to complete their works. In one part of the line, out of all reckoning the plaintiff's land, but through land of their own, and without any prejudice whatever to the plaintiff, they had made a cut deviating in some parts more than a hundred yards from the parliamentary line; and it was sworn that such deviation was only temporary, and that they had not finally abandoned the intention of following the parliamentary line. An objection obtained *ex parte* was on this state of things denied, 1stly, on the ground stated by Mr. Baron Alderson in that part of his judgment which I have extracted, and 2ndly, on the ground that the Court could not be satisfied from the evidence before it, that the defendants would not ultimately follow the parliamentary line.

4. But a company will not be protected against destruction of its works by a person who has recovered in ejectment against it, where it has erected such works against the consent of the party having the legal title (a). On similar principles a public company, acting under an act of parliament, will not be permitted to take, under its powers of compulsory purchase, land for a *purpose* different from that for which it is authorized to take it. Thus in a case where a railway company wanted to go before a jury to assess land on one side of a cutting for the purpose of making a slope on each side of the cutting, and for making an embankment on a neighbouring part of the line, the Court intimated that it could not be permitted to take the land for any other purpose than that which was within the compulsory clause of the act. And as to that, the company was restrained from going before a jury for more of the land than was stated to be necessary

(a) *Colegate*, p. 267.

(*) *Northampton and Stony Stratford Rail.*

See Conway v. Wilson, Rolls, 4 Jur.

769.

by the report of an indifferent engineer agreed upon by both parties (o). But it seems that though at the time of giving notice to purchase, a company may not be in a condition to have a right under its act to take land, yet, if subsequent events give it a title, the Court will not prevent it from exercising that right (p).

5. A company having given notice under their parliamentary powers to a party that they require certain land, will not be permitted to include in their precept to the sheriff to summon an assessing jury, lands different from those included in the notice; for if they were not bound by the notice, they might subdivide the contract, on going before the jury, and take the opinion of the jury on any part of the land, without any intimation to the owner as to what part that is to be (q).

But if a railway company purchase in pursuance of their powers a subsisting lease in lands, and give notice to the reversioner for summoning a jury to assess the value of the fee simple, they will not be restrained from proceeding to assess the whole of the lands, on an allegation that they are only entitled to take a part; because if they are in reality only entitled to take a part, then the intended proceedings would be a mere nullity so far as regards the part they are not entitled to take (r).

6. In some cases the Court will, on account of the heavy injury arising to a railway company from having its works stopped, refrain from issuing an injunction, provided it undertakes to do that which the Court decides it is bound to do. Thus, where a railway company was bound by its act, if it crossed a turnpike road, to raise or sink such road, so that either the road should pass over

(o) *Webb v. Manchester and Leeds Railway Company*, 4 My. & Cr. 122; S. C. 1 Railway Cases, 375.

S. C. 1 Railway Cases, 576.

(r) *Mouchet v. Great Western Rail-*

(p) 4 My. & Cr. per L. C. p. 118.

way Company, 1 Railway Cases, 567.

(q) *Stone v. Commercial Railway*

The railway, on the railway pass over the road by means of a bridge of stated height and width, and the company laid down rails across a turnpike road, and used them for carrying on the works, by conveying materials thereon in wagons drawn by horses; the Court held, that before making the railway, the company were bound to build a bridge, but having regard to the long-continued injury which would be inflicted on the company, by restraining it till the bridge was built, the Court, instead of granting an injunction *simpliciter*, put the company on terms to build a proper bridge, otherwise an injunction to be granted (d). So in a case where a company entered into an agreement with the owners of a piece of land, that they should have a given part of it for a certain sum, of which in the understanding of both parties part was for the value of the land, and the remainder for severance and collateral damage, and the company were to have any additional land they might want at the same rate per acre; the Court held that the company had no right to any further land, except on terms of paying according to the price paid for the first piece per acre for the value of the land, and for the collateral damage, according to the extent of it; but no injunction was granted, the company undertaking to go before a jury to have the collateral damage assessed; and that if they did not properly act on the order, the injunction should be considered as granted on the day on which that order was made (e).

7. But in a case where a railway act enacted, that wherever it should be found necessary to cut through, take, or so much injure any part of any quay, wharf, or other communication, as to render the same impassable or inconvenient for transporting, &c. any goods, the company should

(d) *Northampton and Great Central R.R. Co. v. London and Southampton Railway Company*, 1 Railway Cases, 658, and 5 Law Journal, 277, and see *Thames v. London and Hampshire*

and Reading Company, on appeal, 1 Rail. Cas. p. 171.

(e) *Jones v. Great Western Railway Company*, 1 Railway Cases, 684.

previously cause another equally convenient quay or other communication to be constructed; an injunction restraining the company from prosecuting any works which rendered the plaintiff's wharf inconvenient, was sustained pending an inquiry at law, whether the company having carried the railroad in front of his wharf so as to cut off its general access to the water, and having made a jetty leading from the water to the wharf, had complied with the terms of the act. And the injunction was so sustained, notwithstanding it appeared that the further prosecution of the works would do no greater amount of injury to the plaintiff than had already been done, and that the only effect of sustaining the injunction would be to stay the completion of the railway (*u*).

8. It is here proper to observe, that in the case of a party complaining of injury from the execution of works, such as those of a railway company, it is even more incumbent on him than in ordinary cases to apply without delay for relief; and that, as the injury to the defendants in being stayed (if it shall ultimately turn out that they are acting lawfully) is great in proportion to the magnitude of their operations, the Court will in general hold even slight acquiescence on the part of the complainant a bar to his obtaining an injunction (*v*).

Where, however, the proprietors of a turnpike road stand by while a railway company lays down temporary rails across their road, and employs wagons drawn by horses only on such temporary railroad for the purpose of carrying on the works, that is not such laches as will deprive the turnpike road company of any right they have to an injunction to restrain the railroad company from using the railroad for public traffic with locomotive engines (*x*).

(*u*) *Bell v. Hull and Selby Railway Company*, 1 Railw. Cas. 616.

(*v*) *Agar v. Regent's Canal Company*, 1 Swanst. 245; and see *Greenhalgh v. Manchester and Birmingham Railw. Company*, 1 Railway Cas. 68;

Semple v. London and Birmingham Railway Company, 1 Rail. Cas. 120.

(*x*) *Northam Bridge and Road Company v. London and Southampton Railway Company*, 1 Rail. Cas. 653; 9 Law Jour. N. S. 277.

9. With regard to what constitutes that amount of laches which will deprive a party of his right to relief by injunction, it is difficult to state any positive rule. To a very considerable extent each case will be governed by its own particular circumstances; the authorities on this subject appear, however, to support the following general propositions:—

1. That if the party is cognizant of his right, and does not take those steps to assert it which are open to him, before he has allowed the adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of equity (y). But if the delay is satisfactorily explained, as that it was in fact in the nature of a negotiation under protest, with a view to an amicable arrangement (z); or if the delay is while the acts done are only preliminary to the acts against which the plaintiff claims relief, and not such acts themselves (a), the plaintiff will not by such delay lose the benefit of his equity. And it seems doubtful, where both parties are ignorant of the equity or right which the one party might have asserted, if he was aware of it, how far he ought or ought not to be prejudiced in the assertion of that right which belonged to him, by the situation in which the other party may have been placed owing to the non-assertion of it (b).

It must be observed that laches may deprive the defendants of their right to dissolve, as well as the plaintiff of his right to obtain an injunction. Thus it has been held, that although the circumstance of the plaintiff having concealed material facts on an application for an *ex parte* injunction, would be good ground for dissolving it, yet if the defendants have let several months elapse before coming to dissolve, they will not, after such delay, be heard to dissolve on that ground (c).

(y) *Greenhalgh v. Manchester and Birmingham Railway Company*, 1 Railw. Cas. 68.

(z) See *Innocent v. North Mid. Railway Company*, 1 Railw. Cas. 242.

(a) *Northey Lodge and Pond*

Company v. London and Southampton Railway Company, 1 Railw. Cases, 653.

(b) 1 Railw. Cas. 110.

(c) *Bell v. Hull and Selby Railway Company*, 1 Railw. Cas. 616.

10. The jurisdiction of equity to restrain a railway company from so dealing in the course of its operations as to injure the property of another, is not taken away because it happens that the act incorporating the company, points out specifically a mode in which a party complaining of its acts may obtain compensation (*d*).

11. In exercising such jurisdiction, the Court will, in the absence of positive directions by the act of parliament, construe the general powers given by it, so as to preserve to the party affected by the operations of a railway company, advantages equivalent to those which he would have had if the act had not passed. Therefore where a company had the usual powers to take and interfere with lands for the purpose of the railway, and under those powers was proceeding to carry the railway over a mill-race by means of a bridge, which appeared by the evidence not to be of such figure and dimensions as would secure to the miller the same enjoyment of the working power of his mill as he would have had if the railway had not been constructed; Lord Lyndhurst, C., granted an injunction to restrain the company from making over the mill-race any arch of less dimensions than the arch recommended by an engineer chosen by both parties to report thereon (*e*). But if the act is specific in its directions, then the Court will confine itself to enforcing compliance with such directions. Thus, where a company was bound, on erecting any bridge in order to carry the railway over or across any turnpike road, to make the span of such arch of such width as to leave a clear and open space under it *of not less than* fifteen feet, it was held, that, provided a clear space of not less than fifteen feet were left under the arch of the bridge, the company might erect piers on the road, and make the bridge in any manner they might think proper. And an injunction was refused, to restrain them from making a

(*d*) *Coates v. Clarence Railway Company*, 1 Russ. & Myl. 181. (*e*) *Ibid.*

bridge with an arch having twenty-four feet clear way over a road of thirty-eight feet wide (f).

When, however, an act provides only for an arrangement, depending on the discretion and agreement of the parties, the Court will not interfere. Thus when a water company was permitted by its act to supply water at rates to be agreed on between it and the inhabitants, and obtained afterwards a further act by which it was only to take *reasonable* rates, the Court refused, at the expiration of the agreement with the inhabitants under the first act, to restrain the company from cutting off the plaintiff's supply, on his refusal to pay new and higher rates. The ground was that there was no mutuality, inasmuch as the Court could not compel any inhabitant to take water; and that unless it was decided what was a reasonable rate, there was no title in the inhabitants to come to the Court (g).

12. It may be collected from the foregoing cases, and it has been very lately specifically determined, that in adjudicating between public companies and individuals, the Court acts (as in truth it does in almost all cases of injunctions to restrain injuries to property) only as arbitrary to an assumed legal right. It will not upon an allegation of an equity interfere against an admitted legal act, unless there be a manifest certainty that at the hearing the plaintiff will be entitled to relief. Therefore, in a case where a shareholder in a railway company, being also a director, released by agreement with the company certain shares, but not according to the forms prescribed by the act for forfeiture of shares, and it was clear that the intention of the parties was that the shareholder should be thenceforth released from his liability to the calls; several calls having been made afterwards without any claim on him, and after he had ceased to be a director, the Lord Chancellor held

(f) *Attorney-General v. South-
ampton Docking Company*, 9 Sim.
78; S. C. 5 H. L. Cas. 207.

(g) *Wells v. West Middlesex Water
Works*, 1 J. & W. 338.

his title was not so clear as to justify restraining an action for the calls brought against him by the company, except on terms of his giving judgment in the action, and paying the money into Court, to abide the decree at the hearing (*h*).

13. The general course, where the legal right is doubtful, is to put the parties in a situation to try such right as quickly as possible, and to protect the property in the meantime. And the Court will not consider whether the result may be inconvenient to the one or the other party; for it has no right to deprive one party of what he is entitled to because it is inconvenient to another party (*i*).

14. But where the title to relief is doubtful, the Court seems to be much influenced by a reference to the question whether it will do more injury to the plaintiff by withholding the injunction, if it shall turn out that he is right; or to the defendant by granting it, if the right shall ultimately appear to be on his side. Thus, although where by an act of parliament a trust is fastened, to come into operation at a future day, upon property previously held by parties as their own, they cannot in the interval deal with it as their own (*k*); and although the jurisdiction of equity to restrain them by injunction from so dealing with it seems clear (*l*); yet, if it is doubtful whether the acts contemplated by the persons in possession are or not within the act of parliament, and the effect of the act is that if they are not done within a given time, they cannot be done at all; and if in addition to these circumstances there is no substantial danger to the property, the Court will not enjoin; because to restrain the defendants would

(*h*) *Playfair v. Birmingham, Bristol, and Thames Junction Railway Company*, 9 Law Journ. 253; S. C. 1 Railw. Cas. 640.

(*i*) See Lord Cottenham's observa-

tions in *Kemp v. London and Brighton Railway*, 1 Railw. Cas. 507.

(*k*) *Attorney General v. Corporation of Liverpool*, 1 Myl. & Cr. 171.

(*l*) *Ibid.* 202.

have the effect of precluding them from ever doing that which it may turn out it would be lawful for them to do (a).

15. A contract between parties whose interests will be injured by the construction of a public work, and those who are applying to parliament for an act to carry it into effect, for the withdrawing of a question in parliament, in consideration of a pecuniary consideration, is not illegal (b). Neither is it where the contract is that in consideration of the hostile parties allowing the act to pass unopposed, without certain protecting clauses, a formal deed shall be executed after the passing of the act, embodying such clauses in its covenants, at least where the proposed covenants of the deed are not inconsistent with the clauses of the act (c). As where a railway act provided that no bridge, to carry any public road over the railway, should be *less than fifteen feet in width*, and the covenant stipulated for, was that a bridge over the railway on the road in question should have a clear width equal to that of the existing road, which was fifty feet, the Court said, although the act provided that bridges should be not less than fifteen feet in width, it did not provide that they should not be made wider; and the company might have agreed under the act that the bridge in question, or any other, should be fifty feet wide.

In the case referred to, the principal point was, whether such a contract, entered into by one of the projectors of a railway company before its incorporation, and who after such incorporation became one of the directors, was binding in equity upon the company; and Lord Cottenham held that whether the contract was binding at law or not, and whether the company and the projectors could be identi-

(a.) *Attorney General v. Corporation of Liverpool*, 1 Myl. & Cr. 171; see also Lord Cottenham's observations in *Simple v. London and Birmingham Railway Company*, 1 Railw. Cas. 134, 135; and in *Greenhalgh v.*

Manchester and Birmingham Railway, 1 Railw. Cas. 117.

(b.) *Farnfield Bridge Company v. Earl Spencer*, 2 Med. 356, Jan. 64.

(c.) *Edwards v. The Great Junction Railway Company*, 1 Myl. & Cr. 600.

fied or not, it was clear that the company had succeeded to and were in possession of all the projectors had before ; that they were entitled to all their rights, and subject to all their liabilities ; and that in equity they could not be allowed to exercise the rights given to them by the act, without regard to the antecedent agreement that those rights should only be used in a particular manner. His Lordship, on these grounds, sustained an injunction, restraining the company from executing certain works in a manner inconsistent with the agreement entered into by the persons who had projected the company.

So where the projectors of a railway company A., by their agent, entered into an agreement with the plaintiff, a land owner, for the withdrawal of his opposition in parliament, and afterwards, a rival company, B., applying to parliament, it was proposed and agreed to by the promoters of the two lines to refer it to certain members of the committee of the House of Commons, to determine which of the two should be adopted ; and that, whichever was adopted, the shareholders in the other might, if they chose, become shareholders in it ; and that it should be liable to the engagements of the other. The line B. being determined upon, it was held that the company incorporated to carry into effect that line was bound by the agreement of the promoters of the original line A. with the plaintiff ; and the company was accordingly restrained from proceeding with the works till the plaintiff should have received the stipulated compensation (*p*).

Again, where the promoters of a railway company purchase the shares of a canal company, including the interest of the canal company in the wharfs, &c. on the banks, subject to the rights of their lessees ; and in order to purchase the neutrality of those lessees, enter into an agreement with the canal company and the lessees, containing a clause that on giving notice within a limited time, the lessees shall be

(*p*) *Stanley v. Chester and Birkenhead Railway Company*, 1 Railw. Cas. 58.

entitled to sell to the railway company their interests ; the moment a lease gives such notice, the relation of vendor and purchaser commences between him and the railway company ; and the latter will be restrained from using their legal rights, by bringing objection under a clause in the lease, empowering the landlord to determine the lease on certain terms, until the proper amount of the purchase money is ascertained and paid (y).

The decisions in the foregoing cases seem to have been, to a considerable extent, dependent on the equity created, by the party claiming relief having, on the faith of certain things being undertaken to be done by the company, retired from contesting the grant of its privileges and powers.

16. For in another case (z) of a very similar character, Lord Cottenham adverted to the absence of that circumstance as partly the ground of his decision. In the case to which I refer, the College of Eton opposed the bill of the Great Western Railway Company ; and in consequence of such opposition, clauses, which were founded on a proposal made to the college by the chairman of the promoters of the railway company, were introduced in the committee of the House of Lords into the company's act. It was obvious that the clauses were framed for the purpose of preventing the acts of which the college complained by their bill, and that it had been the intention of the college to prevent any station, or in substance, the consequences of a station, near the college ; but, on the wording of the clause, the Court was of opinion that the company could not be restrained from setting down or taking up passengers, or from allowing them to pass up or down an old existing road, provided they did not make any road or way, or erect anything actually in the nature of a station ; and refused, in consequence, to restrain them from doing that which did not fall within the strict legal acceptance of the restrictions in the

(y) *Don v. Lister and Carter*. (z) *Eton College v. Great Western Railway*, 1 Railw. Cas. 257. *Eton College v. Great Western Railway*, 1 Railw. Cas. 200.

restrictive clauses ; the Lord Chancellor saying, “ it is very important to observe, that there is nothing in the nature of contract between the parties. If upon the proposals the college had retired from the contest, and had acquiesced in the provisions of these clauses, supposing that they would effect their purpose, *it might have been a subject for consideration whether these acts were not an evasion of the contract, which in that case would appear to exist between the college and the company.* Such is not the case ; both parties were entirely at arms-length.”

So where the trustees of a turnpike road, being applied to by the promoters of a railway for their assent to carry the railway across their road, gave their assent, provided the same were carried over at a sufficient elevation, and the road not sunk ; but there was no undertaking by the railway promoters that a clause to that effect should be introduced. The bill was passed, the House being aware of the qualified assent of the trustees, and the trustees being passive, without any clause binding the railway company not to lower the road. It was held that the railway company was not bound by the terms of the qualified assent of the road trustees ; and an injunction to restrain the company from lowering the road, to obtain the requisite parliamentary elevation of the bridge, was refused (s) : and that, although the lowering of the road rendered it, from its peculiar situation, liable to be occasionally flooded.

And a landowner, who, on the faith of a verbal promise, made on the part of the promoters of a railway company, that his land is not to be taken, abstains from opposing the bill and leaves the country, will not, notwithstanding such promise and his absence, be entitled to restrain the company from taking his land under the general powers given by the act, if on a notice, pending the bill, being served on his agent, requiring the land, he has been returned to parliament by such agent as a dissenting land-

(s) *Aldred v. North Midland Railway*, 1 Railw. Cas. 404.

owner, and treated as such throughout the conduct of the bill(s).

17. In a case where the promoters of a railway company, not having yet determined on a line, entered into an agreement by deed with a landowner, who was also a peer of parliament, in lieu of inserting a clause in the act, that if they selected a line through his estate they should pay for the premises 20,000*l.*, and for collateral damages 100,000*l.*, and he for those considerations withdrew his opposition; the company was restrained from summoning a jury to assess under the powers of the act the value of his estate; and that, although the time limited by the act for their power of compulsorily taking lands had so nearly elapsed, that it must of necessity elapse before the question whether the company were or not bound by the agreement could be tried at law (1). In this case the Court relied on the circumstance that no fraud on the legislature could be imputed to the plaintiff, because at the time when the agreement was entered into, it had not become binding on the company to take the line to which the compensation in the agreement referred. And it may therefore be supposed that the Court would have thought the agreement impeachable, if the intention of it had been to substitute a new line for that sanctioned by the legislature. But this point has since been determined at law, in a case where the question was as to the validity of an agreement entered into between a peer of parliament and the promoters of a railway company. The terms of the agreement were, that if the plaintiff would withdraw his opposition to a bill then before the legislature, and suffer it to pass in its then existing shape, the company would use their utmost endeavours to procure in the next session an act to deviate their line, and if the bill then in par-

(1) *Hargreaves v. Lancashire and
Porter Junction Railway Company*, 1
Rail. Cas. 416.

(1) *Lord Petre v. Eastern Counties
Railway*, 1 Rail. Cas. 462.

liament passed, they were to pay him 5000*l.* for compensation, on account of the injury arising from the proposed deviated line. The agreement was not divulged either to the House of Lords or to the landowners on the line contemplated in it. The very essence, therefore, of the entire arrangement was to obtain from parliament permission to make a line, which, at the time of asking it, the parties did not intend to make. The case first came before Lord Langdale, M. R., on demurrer(*u*), and his Lordship appears to have thought that such an agreement would be invalid. It afterwards came on appeal before Lord Cottenham, but his Lordship gave no opinion on that point, and allowed the demurrer on other grounds(*x*). The question was then tried at law, and the Court of Queen's Bench appears to have thought the fact of the party withholding his opposition for a consideration, being a peer, would not invalidate the agreement, but held that the circumstance of its being concealed from the legislature was fatal(*y*). Finally, it was determined in the Exchequer Chamber, by the whole Court, that the agreement was not invalid. The Court held, firstly, that in order to invalidate the agreement as a fraud on the legislature, it was not enough to shew that it was *in fact* kept secret from the legislature, but it was necessary to show that it was the *intention* of the parties at the time of making the agreement to keep it secret, an intention which was not shown to exist.

Secondly, That as regarded the landowners the same observation applied, viz. that there was no intention shown to keep the agreement a secret from them; but even if there had been such intention, it was not clear that that would invalidate the instrument, as there was no common obligation on all the proprietors of land to place themselves on the same footing, but each might lawfully make

(*u*) *Simpson v. Lord Howden*, 1 Rail. Cas. 326; and see 1 Keen, 583.

(*y*) *Lord Howden v. Simpson*, 1 Rail. Cas. 347.

(*x*) 1 Rail. Cas. 338.

the best bargain he could for himself in respect of his land. And,

Thirdly, That though the plaintiff was a peer, that would not affect his right to make any bargain for the sale of his land, or for a compensation for an injury done to it; the presumption being, as there was no agreement to the contrary, that his quality as a peer in no way affected the bargain in question; but that notwithstanding the agreement he was left to exercise his free judgment as to giving or withholding his vote according to his conscience, upon the measure when it came before him in his legislative capacity (24).

18. In a case before Sir L. Stodwell, V.C., a canal company was restrained, at the suit of one of the shareholders, from affixing the corporate seal to a petition to parliament, to convert a portion of the canal into a railway, and from applying any of the corporate funds to that purpose (a). And in another case of exactly the same nature, the same learned judge overruled a demurrer; but Lord Brougham, in a case of *Ware v. The Grand Junction Water Company* (b), in which the case before the Vice-Chancellor was cited, held that the Court cannot, at the suit of a minority of the shareholders of a company, incorporated under an act of parliament for certain purposes, restrain the company from applying to parliament for powers to alter its character and objects, or from using its corporate seal and funds in pursuing such application. Such a power his Lordship held to be incident to corporations of that nature.

(*) *Lord Henden v. Simpson*, 1 Rail. Cal. 347.

Belton Canal Company, 2 Russ. & Myl. 460, n.

(a) In *Cutcliffe v. Manchester and*

(b) 2 Russ. & Myl. 470.

CHAPTER IX.

Injunctions in Matters of Bankruptcy.

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| <ol style="list-style-type: none"> 1. <i>General Ground of granting Injunctions in Bankruptcy.</i> 2. <i>Injunctions to stay Proceedings at Law by Bankrupt disputing the Commission.</i> 3. <i>Application to be by Petition, and not by Bill.</i> 4. <i>Whether Bankrupt can be made Party to a Bill for Discovery and Injunction.</i> 5. <i>Bankrupt may file Bill for Discovery and Account, but not for Payment.</i> 6. <i>Allen v. Kilbre.</i> 7. <i>Assignees not in general restrained from selling Effects.</i> 8. <i>Creditor cannot prove and bring Action also.</i> 9. <i>Landlord cannot prove and distrain for same Rent.</i> | <ol style="list-style-type: none"> 10. <i>Injunctions to stay advertisement of Bankruptcy in the Gazette.</i> 11. <i>Not granted ex parte to stay Issue of improper Fiat.</i> 12. <i>Where Court will interfere against legal Title of Assignees.</i> 13. <i>Injunction against Sequestrator becoming Bankrupt.</i> 14. <i>Where Creditor by reason of an Injunction and Bankruptcy of his Debtor, has lost an Advantage.</i> 15. <i>Commissioners not restrained from examining Bankrupt by Charge that the Petition has been got up to procure Evidence against him of illegal Gaming.</i> 16. <i>Claim of Assignees, to Lease executed, but not delivered to Bankrupt.</i> |
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1. **INJUNCTIONS** are frequently granted in bankruptcy, to prevent vexatious litigation; or to prevent the improper or improvident sale or disposition of the bankrupt's effects; and for other objects which will be noticed under this head.

2. Where a bankrupt has done acts evincing acquiescence under his commission, as where he petitioned in the name of another creditor for new assignees; or where, after surrendering to the commission, without then questioning its validity, he asks for an allowance, and assists the assign-

nces, and then presents a petition to supersede the commission, which is dismissed by the Land Chancellor; or who, looking acted himself as agent for his assignees in the sale of his estate, to procure a purchaser, he disputes the validity of the commission, and brings an ejectment seven years after the bankruptcy;—in all these cases, and particularly if considerable time has elapsed, he will be restrained by injunction from bringing actions against his assignees (c).

In *Ex parte White*, the bankrupt was restrained by perpetual injunction from continuing a then subsisting action, or from bringing any others to try the validity of the commission.

So in *Ex parte Dury* (b) it was determined by the whole Court of Review, that where a bankrupt's commission had issued upwards of twenty years, and, so far from speedily attempting to set it aside, he had done various acts of acquiescence more or less strong, he should be restrained, after such lengthened acquiescence, from bringing actions against purchasers under the assignees, to question the validity of the commission.

But it seems that if a bankrupt were to submit to the commissioners under protest that he is no bankrupt, he might still bring an action (c).

A bankrupt will also be restrained in due time from further vexatiously disputing the validity of his commission, where he has repeatedly questioned it, and thwarted his assignees in its progress (d).

But on the other hand, where a bankrupt showed by his petition, verified by affidavit, that by his friends he was willing and able to pay the creditors in full, except certain consenting ones, an injunction was granted to restrain the

(c) *Flower v. Herbert*, 2 Veb. 303.
320; *Ex parte Lloyd*, 2 Mer. & Cr. 164, and 1 Decr. & Clk. 279; *Ex parte Lloyd*, 2 Gly. & Juv. 312; *Ex parte Graft, Bank*, 90.

(b) 1 Mer. & Cr. 283.

(c) *Edmon v. Herbert*, 2 Veb. 326.

(d) *Per Lord Eldon in Thorpe v. Goodall*, 17 Ves. 303.

assignees from selling the property till further order, the bankrupt undertaking not to remove or dispose of it in the mean time (*e*).

But though the Court will not permit a bankrupt to try repeatedly and vexatiously the question of his bankruptcy, a single trial does not constitute that vexation that will authorise the Court to interfere by injunction (*f*). Nor will a bankrupt be restrained by equity from presenting any more petitions to the Court, although he has presented two for the same object, and both have been dismissed (*g*).

3. It was formerly doubted, and the cases were conflicting, whether an injunction in matters of bankruptcy should be obtained by petition or by bill. In an early case (*h*), an injunction was granted in a cause on the motion of the assignee, but the question of jurisdiction was not raised.

In *Ex parte Grant* (*i*), Lord Eldon granted an injunction upon the *petition* of the assignees, distinguishing it from a case before Lord Thurlow, in which that learned judge had refused to grant an injunction, except on bill filed, on the ground that in the case before Lord Thurlow the creditor had not come in under the commission, and therefore it was clear that he could not obtain an injunction except on bill filed.

In *Kirkpatrick v. Dennett* (*k*), Sir J. Leach allowed a demurrer to a bill for an injunction to restrain a bankrupt from proceeding at law to impeach the validity of his commission. "If (said his Honor) a bill would lie, a bill in the Court of Exchequer would also lie, and bankruptcy would come to be administered in that Court. The proper and familiar course is by petition."

In *Ex parte Cutten* (*l*), the same learned judge made an

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| (<i>e</i>) <i>Ex parte Figes</i> , 1 Gly. & Jam. | (<i>h</i>) <i>Flower v. Herbert</i> , 2 Ves. sen. |
| 122; see also <i>Allen v. Kilbre</i> , 4 Mad. | 326. |
| 464; and <i>Ex parte Harding</i> , Buck, 24. | (<i>i</i>) Buck, 90. |
| (<i>f</i>) 1 Ves. & B. 216, 506. | (<i>k</i>) 1 Sim. & Stu. 408; and 1 Gly. |
| (<i>g</i>) <i>Ex parte Shaw</i> , 2 Ves. jun. | & Jam. 300. |
| 40, a. | (<i>l</i>) 1 Gly. & Jam. 317. |

order on petition; the point of jurisdiction does not seem, however, to have been much argued in that case.

All the foregoing cases were referred to in *Ex parte Gleanings*(6), and Lord Eldon then said, that after examining them all, he was satisfied the only remedy was by bill.

In a subsequent case (7), the question of jurisdiction was again discussed before Lord Lyndhurst, C., and his Lordship made an order on petition, taking, however, no notice of the point of jurisdiction. It is to be observed, that in this case Lord Eldon's decision in *Ex parte Gleanings* was not cited, and the only case against the jurisdiction to make the order on petition that was cited, was *Fletcher v. Herbert*, in which it has been already observed that the point was not discussed. In *Ex parte Hornby*(8), Lord Brougham treated it as settled by authority, that the proper course is by petition and not by bill. The point was again raised before the Court of Bankruptcy, since the 1 & 2 Will. 4, c. 56, in the form of an objection to the jurisdiction of that Court, on the ground that an injunction can only be granted on bill; and it was decided by the whole Court that it had jurisdiction, on the ground that under the Act referred to, it had power to determine all such matters in bankruptcy, as at the time of the passing of the Act "usually were or lawfully might be brought by petition or otherwise before the Lord Chancellor;"—and that the later authorities preceding the 1 & 2 Will. 4, c. 56, had established, that an injunction ought to be applied for in bankruptcy by petition (9). Many cases also are to be found in the books before the 1 & 2 Will. 4, c. 56, in which injunctions have been obtained in bankruptcy, on petition, without the propriety of that course being called in question (10).

(*) 2 Gly. & Ja. 206.

Chit. 322.

(*) *Ex parte Leigh*, 2 Gly. & Jam. 332.

(14) *Ex parte Fletcher*, 1 Ves. & B. 350; *Ex parte White*, 4 Deac. &

(*) 1 Mont. & Bl. 1.

Chit. 279; *Ex parte Figgis*, 1 Gly. &

(1) *Ex parte Duns*, 4 Deac. &

Jam. 122.

And it may be stated as the settled practice now, that an injunction in bankruptcy is to be obtained on petition (r).

It must not however be understood that the mere fact of the party for or against whom an injunction is sought being a bankrupt, makes it proper to proceed by petition; if the application is not properly speaking in the bankruptcy, but to the Lord Chancellor sitting in equity, it should be by bill and motion in the ordinary way.

4. It seems doubtful whether in a suit in which an injunction is sought against the assignees of a bankrupt, the bankrupt himself may be made a party to obtain discovery from him, and to sustain an injunction against his assignees, by reading his answer against them. In a case of *Whitworth v. Davis*(s) this point arose, but did not call for an actual decision. It was stated to be the practice that the bankrupt may for the purpose of the injunction be made a party; but Sir Thomas Plumer, V. C., objected that it was difficult to conceive how the bankrupt's answer could be read against the assignees, even for the purpose of an injunction, when clearly it could not be read against them at the hearing. To this argument it may however be answered, that there is a wide distinction between reading the answer of a defendant for the purpose of obtaining an injunction against another defendant, and reading it at the hearing; because at the hearing the reason for excluding the bankrupt as a party, is that having no interest, no relief can be had against him, and he can be examined as a witness. But for the purpose of an injunction, an examination of witnesses does not take place, and it is not in every case that affidavits can be read. If therefore the bankrupt could not be made a party for the purpose of discovery, and if his answer could not be read for the purpose of sustaining an injunction, there would be in many cases which might be put, an absolute denial of justice. It is sub-

(r) See also on this Archbold's and the cases there cited.
Bankruptcy, edit. Flather, 338, 339, (s) 1 Ves. & B. 545.

mitted, therefore, that what was stated in the case of *Whitworth v. McGregor* to be the current opinion of the bar, seems supported by stronger reasoning than the opposite opinion. A learned author on the subject of parties to suits in equity, after discussing the authorities referred to, treats the point as still undecided (1). It should, however, be noticed, that in a case of *Griffin v. Leckwith*, in the High Court, a demurrer by a bankrupt to a bill praying a discovery and injunction in aid of an action at law was allowed.

5. Where creditors of a bankrupt, instead of seeking relief under the commission, bring an action against him, it is clear the bankrupt may file a bill of discovery, and for an injunction in the mean time; but though a bankrupt, under such circumstances, cannot ask for an account and for payment of that which shall appear due on taking the account, because that belongs to the assignees, yet if the very ground put forward by the bill for asking the stay of proceedings at law, is, that there are complicated accounts between the bankrupt and the plaintiffs at law, the bankrupt has a right to say that he will not be satisfied by the mere answer of the defendant; he has therefore a right to have the accounts taken as well as to discovery (2).

6. The assignees of an insolvent partner are entitled to his interest in the partnership, but do not become partners. And therefore an *ex parte* injunction will be granted at the suit of the solvent partners, on the terms of serving immediate notice on the assignees, to restrain them from selling the joint effects. But the solvent partners must offer to account for the plaintiff's share (3). The authority of the case referred to, is questioned by Mr. Collyer, in his Trea-

(1) See Calvert on Parties, 22, 200, 202.

(2) *Leadbetter v. Taylor*, 1 Mad. 423.

(3) 2 Aust. 476.

(4) *Asley v. Bristow*, 4 Mad. 384.

tise on Partnership (*y*), on account of the plaintiff not offering *to pay the joint creditors*. He cites, however, no authority to show that they are bound to do more than account for the plaintiff's share.

7. The Court will not, however, in general interfere to restrain assignees from selling a bankrupt's property on an allegation that the sale is too hasty; because the assignees act at their peril, and are to be the judges of the propriety of the sale (*z*). But when there have been cross demands between a bankrupt and his creditor, which it is clear would entitle the creditor to set-off at law, the Court of Bankruptcy will restrain the assignees from bringing an action, as it would be an improvident waste of the estate to bring an action in which set-off must succeed (*a*).

8. When a creditor has proved on a bill given by the bankrupt, he will be restrained by perpetual injunction from bringing an action on it. And in a case where the creditor held two bills, and had proved on one, and it did not appear clear on which the action was brought, the Court referred it to the Commissioners, to ascertain what was the fact, and stayed the action in the mean time (*b*). In an earlier case the Court went still further. In that case a creditor having proved his debt against the bankrupt under the commission, afterwards commenced an action against the bankrupt, and had judgment by default, and caused to be seized in execution part of the property of which the assignees had taken possession; and the latter came for an order to the sheriff to withdraw from possession, and to redeliver such possession to the assignees. The Court said there was no doubt it had jurisdiction to *restrain* the

(*y*) Page 488.

(*z*) *Ex parte Montgomery*, 1 Gly. & Jam. 338.

(*a*) *Ex parte Clegg*, 1 Mont. & Ay.

91.

(*b*) *Ex parte Diack*, 2 Mont. & Ay. 675.

seizure by a creditor, having proved his debt under the commission, of that property which was intended for distribution between himself and others; and that in this instance the Court was warranted in restraining the creditor from proceeding any further with his execution. The Court ultimately made the order prayed for (c).

On similar principles it has been held, in a case where the agent of a foreign government was the holder of bills due to that government by a merchant carrying on trade in the foreign country and here; that on the insolvency of the debtor both in the foreign country and here, the holder of the bills was not entitled to participate in the general administration of the bankrupt's effects under the process of the foreign country, and to be paid dividends under the bankruptcy here, but must elect; and he was therefore restrained by the Bankruptcy Court from receiving any dividends here until further order. And this order was affirmed by the Lord Chancellor on appeal (d).

Again, when a person holds a joint and several security against a partnership, and one of the firm becomes bankrupt, he may go in and prove under the bankruptcy, or proceed by action against the partnership. But if he proves under the bankruptcy, he will be restrained from afterwards bringing a joint action, although one of the defendants will be merely a nominal defendant. This was decided in a case in which, by adopting this proceeding, the plaintiff in equity would have been deprived of setting off in the action, a debt due to him from the plaintiff at law (e).

9. And it was held in an early case, that where a landlord has come in and proved his debt for rent against the bankrupt, and the assignee has sold the goods of the bankrupt, the landlord cannot distrain upon them, al-

(c) *Ex parte Levisson*, 2 Gly. & Ayr. 345.

Jan. 301.

(e) *Lowrey v. Brown*, 1 Ross.

(d) *Ex parte Chambers*, 1 Mont. & 273.

though they remain on the premises, but the vendee is entitled to them, and the landlord will be restrained from distraining, and confined to his remedy under the commission (*f*).

10. An injunction, of a rather curious nature, was sought and obtained by petition in *Ex parte Fletcher* (*g*), viz. by a party against whom a docket of bankruptcy had been struck, to stay the insertion of his bankruptcy in the Gazette. The docket had been struck in respect of an accommodation bill accepted by the petitioner for the petitioning creditor; no demand had been made for two years, and the petitioner swore that he was solvent, and had offered to deposit the amount of the bill. The Lord Chancellor ordered that the commission should be opened, but that the declaration of bankruptcy should not be published till he had inspected the proceedings.

And where a party made a bankrupt, alleges and makes out a *prima facie* case that he is not a trader, and has not committed any act of bankruptcy, the Court will restrain the advertisement in the Gazette, pending the discussion of the question, whether the commission ought or not to be superseded (*h*).

But after adjudication of bankruptcy, the Court will not stay the advertisement, unless on the face of the proceedings there does not appear to have been an act of bankruptcy, or a good petitioning creditor's debt (*i*).

11. Where a fiat in bankruptcy ought to be a country fiat, and a docket has been improperly struck in London, the Court will not grant an *ex parte* injunction to restrain issuing the London fiat (*k*).

12. The Court will sometimes interfere against the legal

(*f*) *Ex parte Grove*, 1 Atk. 104. Ayr. 699.

(*g*) 1 Ves. & Bea. 350.

(*i*) *Ex parte Wood*, 4 Jur. 251.

(*h*) *Ex parte Lavender*, 1 Mont. &

(*k*) *Re Ings*, 2 Mont. & Ayr. 671.

title of the assignees as such, where the assertion of such legal title would operate against conscience. Thus where a creditor holds policies of assurance of a bankrupt as a security, he cannot sell them without conversion, unless the assignees consent to the sale, but the Court will restrain an action brought by the assignees on such their mere legal rights (*l*).

So if an arrangement has been entered into with the sanction of the Court, between a party claiming a debt from a bankrupt and the assignees, that the creditor should retain a certain sum of money, part of the sum in dispute; the assignees will afterwards be restrained from bringing an action to recover that sum, the creditor paying it into Court (*m*).

And where it appeared that the sum so agreed to be allowed to the creditor was in compensation of part of a sum which he had paid to the landlord of the bankrupt, by which therefore the estate had benefited, the injunction was made perpetual; the assignees, it appeared, were not elected when the payment was made, and it was made with consent of the bankrupt (*n*).

13. A creditor of a clergyman, who has obtained sequestration against him, and been appointed sequestrator, and then becomes bankrupt and is uncertificated, will be restrained from doing any act to discharge the sequestration, or from receiving or demanding anything under the same, on an allegation that he threatens and intends to receive and appropriate the proceeds of the sequestration, and that he will do so before the assignee can procure any sequestrator to be appointed (*o*).

14. When a creditor brings an action against his debtor in the Lord Mayor's Court for a debt, and issues a foreign attachment against such debtor's agent, and is then re-

(*l*) *Ex parte Booth*, 2 Mont. & Ayr. 93.

(*m*) *Ex parte Elliott*, 3 Mont. & Ayr. 110, 184.

(*n*) *Ibid.*

(*o*) *Ex parte Hill*, 2 Mont. & Ayr.

302.

strained by injunction in equity from proceeding in the Lord Mayor's Court, and before he can so proceed the debtor becomes bankrupt; he cannot be restored to the same position as if the injunction had not prevented him from obtaining judgment, and issuing execution before the bankruptcy; and the fund must go to the assignees, and the creditor share only rateably (*p*).

In this case, *Pulteney v. Warren* (*q*) was cited as an authority for the position that the party who had lost his remedy at law, by reason of the interposition of equity by injunction, would be afterwards, on the determination that his claim was *ab origine* valid at law, restored by equity to the same position which he would have been in, had no injunction been granted. But that case differs materially from *Ullock v. Barber* in this respect, that in the former there was not so much a destruction of the right at law in the abstract, as an incapacity to sue at law for such right; whereas in *Ullock v. Barber*, the right of the creditor was totally destroyed by the Bankruptcy Act (*r*).

15. Before the 1 & 2 Will. 4, cap. 56, it was determined that commissioners of bankruptcy could not be restrained from executing their duty of examining a bankrupt, touching a particular debt, because he alleged by his petition that the commission was got up for the purpose of charging him with unlawful gaming, and in order to obtain under it evidence of that fact in aid of an action at law. The Court said that if the bankrupt was in truth subject to penalties for the mode of contracting the debt, he would be sufficiently protected by the rule of law enabling him to refuse to answer questions tending to criminate him; and the Court was not to presume that the Commissioners would not do their duty (*s*).

16. A question arose in a very late case as to the claim

(*p*) *Ullock v. Barber*, 6 Sim. 300;

(*r*) 6 Geo. 4, c. 16, s. 108.

and see 6 Geo. 4, c. 16, s. 108.

(*s*) *Ex parte Burlton*, 1 Gly. &

(*q*) 6 Ves. 72.

Jam. 30.

of assignees to a lease granted to the bankrupt by name, but in effect bought with advances made by third parties, and deposited directly with them, without having been delivered to the bankrupt. The case was this: an under lease of a public-house was granted for a premium, and the purchaser being unable to pay the whole purchase money, it was advanced by the brewers and distillers who supplied the public-house, the lease being deposited at the time of the advance with them, according to the custom of the trade, immediately from the grantor, and without passing at all into the hands of the purchaser; a memorandum being at the same time executed, by which the lessee recited that he had deposited the lease with the brewers, &c. It turned out afterwards that the purchaser was at the time an uncertificated bankrupt, and the assignees claimed the value of the lease, and brought their action against the plaintiffs, who claimed to be entitled to a lien for their advances. It was held that on this state of circumstances, it might turn out to be the fact, that the arrangement was, that although the lease was to be in the name of the purchaser, yet it was in fact to the extent of the money advanced by the brewers to be for their benefit; and the Lord Chancellor, without deciding whether if that should be the case proved at the hearing, it would establish their lien, held that there was so much doubt whether it would not have that effect, or in other words, so much reasonable ground for argument, that a proper case arose for the interposition of the Court: and accordingly the action was restrained till the hearing, the plaintiff bringing the money into Court. It was urged that the equity could be tried in the action at law; but the Court said, even if it were so, it was a case of equitable lien on the deposit of deeds, and peculiarly belonging to the jurisdiction of equity (*l*).

(*l*) *Mear v. Smith, Sage v. Smith*, 1 Mont. & De Gex, 399.

CHAPTER X.

Injunctions to remove outstanding Terms for Years and other Legal Impediments.

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| 1. <i>When an outstanding Legal Impediment will be removed by Injunction.</i>
2. <i>Not if there is a rebutting Equity in the Defendant.</i>
3. <i>General Statement of the Doctrine.</i> | 4. <i>Will not be granted on Motion prior to the Decree.</i>
5. <i>Where, it seems, there would be an Exception.</i>
6. <i>Doctrine extended to the Removal of other legal Impediments, as well as outstanding Terms.</i> |
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1. **THE** remedy by injunction is also applied in aid of the administration of justice in other Courts to remove impediments to the fair decision of a question, by setting up some purely legal title; as for instance an outstanding term or other interest in a trustee, lessee, or mortgagee (*a*). Thus where a landlord, against whom ejectment was brought, having by negligence suffered judgment to go by default, and the tenant having attorned to the ejectors, the landlord afterwards filed his bill, among other things, to restrain his tenant and the ejectors from setting up the lease to the tenant, in any ejectment which he the landlord might bring. And Lord Eldon, C., held that the defendant could not make use of the lease to narrow any of the plaintiffs' remedies or to diminish their number.—“The principle of this case,” said his Lordship, “is, that it is against conscience that the tenant should be allowed to set up in ejectment brought by his landlord, his lease, not to protect his own possession under his landlord, but for

(*a*) Red. Pl. 134, and see 13 Ves. 298.

the purpose of actually evicting and excluding the landlord from his reversion with him as tenant. And that it is an unrighteous use of his lease to protect his title under those to whom he has assigned, against his landlord (b)."

2. But this relief is founded on the principle of there being a better substantiated right in the party claiming it than in his opponent; and therefore if there is a relating equity in the party claiming the benefit of such purely legal title, the Court will not interfere. Thus where there was a tenant for life under a devise, with power to grant building leases for sixty-one years in possession of such parts of the estate as should be fit for building, the leases to contain proper building covenants on the part of the lessees; and the tenant for life made a lease for sixty-one years of certain parts of the estate, not for the purpose of having building thereon, and not containing any building covenants on the part of the lessee. It did not appear that the lessee had notice of the power or of the fact of the lessor being merely tenant for life. In a writ brought by a subsequent tenant for life against the assignee of the lessee, the defendant at law set up in bar outstanding satisfied terms created by the testator. It was held, that the lessee being a purchaser for valuable consideration without notice, had a right to get in and set up outstanding satisfied terms, and a bill praying an injunction to restrain him from setting up the terms was dismissed with costs (c).

3. The general doctrine as to removing legal impediments to the fair trial of a right is stated by Lord Chancellor Manners to be, that the Court never hesitates to remove a temporary bar for the purpose of enabling parties to assert their legal rights in a Court competent to decide them, unless there be fraud, positive or constructive, imputable to the plaintiff in equity; or unless the defendant

(b) *Edney v. Melton*, 10 Ves. 541.

(c) *Goldney v. Alcock*, 2 Sim. 542.

be protected as a purchaser for valuable consideration without notice; but the plaintiff may by acquiescence impose such difficulties on the other party, as to prevent the Court from interfering to protect the plaintiff by removing such temporary bars (*d*).

4. But it must be observed that an injunction to restrain setting up outstanding terms will not be granted on motion prior to a decree or decretal order, as the principle of such a bill is, that the Court directs the mode of proceeding at law under a decree; and that in general till the decree, the Court must suppose the parties to be litigating upon questionable rights (*e*). Consistent with this doctrine are two late determinations from which the rule is to be collected, that an injunction will not be granted on motion to restrain the setting up of outstanding terms, or generally to aid trials at law by equitable relief, where the plaintiff's equity is not made out, and where it may appear at the hearing that the defendants have also a right to equitable assistance in the trials at law (*f*). And the plaintiff must allege that there is an outstanding term, and state what sort of a term it is; a mere allegation that the defendant threatens to set up some outstanding term will not do (*g*).

5. In a very late case, however, in the Exchequer, where the answer admitting the title, set up a defence consistent with that admission, and on which the Court thought at the hearing it might have to pronounce; although the injunction was refused on that ground, the Court seems to have thought that if a party files a bill claiming under a legal title, merely to remove out of the way outstanding terms, which the defendant might set up at law, and the

(*d*) 2 Ball & Bea. 137.

Stu. 419; *Northey v. Pearce*, *ibid.* 420.

(*e*) *Hylton v. Morgan*, 6 Ves. 293;
Byrne v. Byrne, 2 Sch. & Lef. 537;
and see Jac. 196.

(*g*) *Stansbury v. Arkwright*, 6 Sim. 481; *Jones v. Jones*, 3 Mer. 161; and

(*f*) *Barney v. Luckett*, 1 Sim. &

Baker v. Minter, cited *ibid.* 170.

title of the plaintiff is admitted *simpliciter*, and no defence set up which could be made a defence at the hearing, an injunction might be granted on motion to remove such outstanding term (*k*).

6. The same principle will be applied to the removal of other legal impediments to the fair trial of a right at law. Thus in a case of gross fraud, where the defendant had taken possession of the estates of the plaintiffs, and had levied a fine of which they had no knowledge, and met their claims by various fraudulent defences, keeping the fine back until the five years and non-claim had run; the House of Lords determined (reversing the decision of the Court below) that he should be restrained from setting up the fine in bar to an action of ejectment (*i*). And so the Court has restrained a party from setting up the Statute of Limitations in bar at law, against instruments, the validity of which was the subject of litigation in a suit instituted before the statute took effect (*k*).

But in these cases as well as others the general rule prevails, that equity must be satisfied that the party claiming its assistance has the superior substantial legal right. And where a father made a voluntary conveyance to his son, and afterwards the son gave the father a general release, the Court refused to restrain the release being set up against an action on the covenant, saying, if the covenant had been for valuable consideration, setting up the release should have been restrained; but as against a voluntary deed a party should not be deprived of any defence he might have at law (*l*).

(*h*) *Ringer v. Blake*, 3 You. & Col. 591.

(*i*) *Perand v. Turner*, Fitz. 105.

(*l*) *Stiefeld v. Price*, 2 You. &

(*j*) *Pichev. Thornycroft*, 4 B. P. Jer. 73.
C. 92.

CHAPTER XI.

Of Injunctions in Interpleader Suits (a).

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|---|---|
| 1. <i>General Principles of Interpleader Suit.</i>
2. <i>Case of Exception to the General Rule.</i>
3. <i>Practice is to obtain Special Injunction at once.</i>
4. <i>No Affidavit of Facts now necessary.</i> | 5. <i>Of bringing the Fund into Court.</i>
6. <i>Course where some of the Parties are out of the Jurisdiction.</i>
7. <i>Stakeholder Defendant in a Suit touching the Fund in dispute, cannot move for Injunction.</i>
8. <i>Of Interpleader by a Tenant against his Landlord.</i> |
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1. **THE** principle on which an interpleader suit is supported is, that the plaintiff claiming no right in the subject-matter, is doubly vexed by having two legal processes in the names of different persons going on against him at the same time. It is no answer to say, that he may defend himself against the first who brings an action, and that, if he succeeds, there is an end of the claim of that party; but if he fails, that furnishes a defence to the claim of the other party. That is precisely the situation in which the party so claiming no right in the fund, ought not to be placed.

The doctrine above stated was laid down in a case of *Langston v. Boylston* (b). In that case A. deposited securities with his bankers, and was afterwards thrown into prison by persons claiming against him as creditors of a

(a) In strictness, the subject of this chapter would fall under the head of injunctions to stay proceedings at law and in other Courts; but it has

been found more convenient to treat of it in its present place.

(b) 2 Ves. jun. 101.

firm of which he was a partner. Attachments were then served by those parties on the goods of A. in the hands of the bankers. The latter refused to deliver up the goods to A., unless he should be laded, and the attachments taken off. A. then brought an action against the bankers, and arrested them; and they then brought their bill of interpleader. The Court said, that an injunction must be granted. No order was, however, made, and it was finally agreed that A. should defend the attachments in the hands of the bankers.

On the same principle it has been held, that where there are several claimants to annuities granted out of a rent-charge vested in a trustee, and the owner of the rent-charge and the annuitants respectively claim the annuities, the tenant is not precluded from filing a bill of interpleader, from the circumstance of there being but one legal owner, against whom he may have no defence at law (c).

And it may be here observed, that in an interpleader suit, an injunction may be granted to restrain proceedings in equity as well as at law (d).

The principle of *Angell v. Hasle* seems to have been repudiated in a case before Sir John Leach, V. C., where his Honor doubted whether an injunction could be granted in an interpleading suit on behalf of a captain of a trading ship, against a party claiming paramount the bill of lading; on the ground that as against such a party the captain would be protected by delivery according to the bill of lading (e). But in a later case (f), the same learned judge thought such a bill might be filed. On the whole, it is submitted that the doctrine of the two cases first cited must be considered as the better opinion.

The later case of *Warrington v. Wheatstone* (g), although the precise point did not occur in it, also supports the

(c) *Angell v. Hasle*, 15 Ves. 211.

(e) 3 M. & D. 270.

(f) *Cumford v. Fisher*, 9 Law Journ. N. S. 201.

(f) *Morley v. Thompson*, 3 M. & D. 564.

(g) Jac. 202.

principle, that the mere circumstance that the plaintiff in an interpleader suit might have been protected at law by payment to one party, does not preclude him from bringing an interpleading suit, but that his right is to be protected against the double vexation. In that case two parties claimed against an insurance office a sum of money, for which the life of one Henderson had been insured; and one of the claimants had filed a bill against the surviving directors of the office for the sum, and for an injunction to restrain them from paying it to the other claimant; and afterwards that other claimant brought an action against the directors, on which they filed their bill of interpleader against the claimants, and moved for liberty to pay the money into Court, and for an injunction to restrain the proceedings at law. It was objected that the first suit was a sufficient indemnity to them, for that they might in that case move to pay the money into Court; or if not, that the plaintiff in that suit might move for them to do so; and if he neglected to do so, and they paid the money to the other claimant, they would be indemnified. But the Lord Chancellor on appeal held, that their right to the protection of an interpleader suit was not taken away, because the plaintiff in another suit might move to have the money paid into Court. "If," said his Lordship, "you do not let them have the carriage of the cause, and the plaintiff in the other does not move for them to pay the money in, I question whether his not doing so would be an answer to him at the hearing, for the pendency of the suit is notice of his demand."

2. In a case, however, where bankrupts having large property in the hands of their bankers, the creditors did not proceed with the commission, in consequence of an agreement for payment of their debts by instalments at a given time; and the bankers refused to honor the bankrupt's drafts pending the commission; lest, if the commission was executed, they should be liable for paying the money

after notice of the bankruptcy; and the bankrupts brought an action against them: the Court held the bankers could not have an injunction against that action; because if the bankrupts recovered a verdict *bona fide* against the bankers, the latter would be justified in paying the money (i).

3. It seems to have been formerly the practice to grant an injunction to stay proceedings at law in an interpleading suit on bill filed and supported by affidavits before answer or default. That practice was afterwards altered in *Croggon v. Symons* (k), by the Vice-Chancellor with the sanction of the Lord Chancellor; and for many time the practice was to treat an injunction to stay proceedings at law in an interpleading suit, as standing on the same principle as an injunction to stay proceedings at law in any other suit. And therefore an *ex parte* injunction on affidavits before answer would not be granted in an interpleading suit to restrain actions brought against the plaintiff by the defendant (l). But the practice is now that the plaintiff in an interpleader suit may apply at once for a special injunction to stay all proceedings, on paying the money in dispute into Court. The common injunction need not be first obtained (m). And a case is mentioned by Mr. Smith, in which an injunction was granted, although the trial was coming on the next day (n).

4. The plaintiff may move for liberty to pay the money into Court, and for an injunction without supporting his motion by an affidavit of facts (o).

In *Langston v. Boylston*, the Lord Chancellor said, as regarded reading affidavits against the answer, that an interpleading bill is exactly upon the footing of a bill to stay waste, and may be supported by specific evidence of facts,

(i) *Fuller v. Gibson*, 2 Cox, 24.

(k) 3 Mad. 130.

(l) See also 3 Mad. 131, n. a.

(m) *Vicary v. Widgeo*, 1 Sim. 15.

(n) *Pulling v. Edwards*, 1 Smith's Prac. 2d edit. 475.

(o) *Balcanquhall v. Sparks*, 1 Sim. 385; see also *Sedgwick v. Clegg*, 4 Jur. 742.

as well as it is in all cases by specific evidence that there is no collusion; and his Lordship thought that he ought to have admitted affidavits on the part of the plaintiff against the answer.

But at that period it was usual to support an interpleader bill by an affidavit of facts, which, as above stated, is now unnecessary. All that is now requisite is, that the plaintiff should accompany the bill by an affidavit that there is no collusion (*p*), against which no affidavit will be admitted (*q*). Whether therefore the doctrine of *Langston v. Boylston* on that point be right or wrong, it seems at present to have no application.

5. In an early case, it was laid down that the plaintiff, in an interpleading suit touching a sum of money, cannot have an injunction till he has brought the fund into Court (*r*). On this Lord Henley observes, that it should seem that the rule would only apply to those cases where the plaintiff applies specially by motion for an injunction, as there are several cases in which the common injunction had been already obtained, and the question as to payment of the money into Court, did not come into consideration till the discussion as to the continuing the injunction upon the coming in of the answer (*s*).

It must be observed, however, that since it is now unnecessary, and in fact irregular, to obtain the common injunction, the rule may be said to be of universal application in interpleading suits; and indeed in the common order for an injunction in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into Court; and if without the special direction of the Court, the order is so drawn up that it does not make the bring-

(*p*) See 1 Smith's Prac. 2d edit. 36.
474; and 1 Craig & Phil. 188.

(*q*) *Stevenson v. Anderson*, 2 Ves. & Be. 407.

(*r*) *Dungey v. Angove*, 3 Br. C. C.

(*s*) Edén on Injunctions, 346, referring to *Brimer v. Buchanan*, cit. 3 Br. C. 36; *Surrey v. Waltham*, *ibid*.

ing the Court into Court a condition precedent to the issuing of the injunction, the order will be discharged for irregularity (17).

In an interpleader suit in general the Court will restrain either party from proceeding against the stakeholder; but it appears by *Dawson v. Hardcastle* (18), that where the Chancellor thought the point between the defendants would be decided in an action of trover brought by one of them against the plaintiff in equity, the injunction was refused. In that case the Lord Chancellor said, the plaintiff is to have his costs in an interpleader suit, but he never knew them given as between defendants. But it seems by the decree (18) that the defendant Hardcastle was directed to pay to the plaintiff and to the other defendants their costs.

6. An interpleader bill is not demurrable because some of the parties called upon to interplead are out of the jurisdiction; for a person out of the jurisdiction may threaten and bring an action. An injunction, therefore, to restrain proceedings at law will be granted notwithstanding that circumstance; but the plaintiff must use due diligence to bring the parties within the jurisdiction (19). The course is, that if the plaintiff uses due diligence and cannot bring the parties within the jurisdiction, that defendant who *does* come before the Court must have the thing the subject of dispute, and the plaintiff would be protected against the demands of the other defendants by perpetual injunction (20). And in a case where the subject was a policy on a cargo lost, an injunction was granted in an interpleader suit, although both defendants were residing abroad (21).

7. Where an action is brought against the Bank by one

(17) *Steeles v. Behrens*, 2 My. & Cr. 581, *Pauli v. Von Melle*, 8 Sim. 327.

(18) 1 Ves. jun. 308.

(19) *Ibid.*, and see S. C. 2 Cox, 278.

(20) *Steeles v. Anderson*, 2 Ves. & Bea. 407.

(21) 2 Ves. & Bea. 411.

(22) *Martineau v. Helms*, 2 Ves. & B. 412, note.

of two parties claiming the same fund, for refusing to permit a transfer of stock, the Bank cannot, as defendants in a suit touching the fund, move for an injunction to restrain the action, though they may file a bill of interpleader, if they think fit (*b*).

8. Generally a tenant cannot sustain a bill of interpleader against his landlord, on the ground of an ejectment brought by a stranger; for it would be in effect to put it in the power of a tenant to make his landlord, who would be the defendant at law in the ejectment, disclose his title by an interpleader bill (*c*). But a tenant does not, by admitting the title as landlord, of one of two claimants, in ignorance of his title being disputed, preclude himself from filing a bill of interpleader (*d*). And if two persons claim of the tenant rent in privity of tenure and contract, as for instance, if mortgagor and mortgagee, or trustee and *cestui que trust*, claim it of him, he may file a bill of interpleader (*e*).

And where the double demand against the tenant arises not out of the act of a stranger, but of the landlord himself, as where the lessor of tithes became insolvent, and his assignees and the vicar both claimed them; in such a case the tenant may sustain an interpleader suit against his landlord (*f*).

Before concluding this subject, it must be observed, that by a late statute (*g*), Courts of law are enabled to give relief by interpleader, against adverse claims made upon persons having no interest in the subject of such claims.

(*b*) *Birch v. Corbin*, 1 Cox, 144.

(*e*) *Ibid.* 312.

(*c*) *Dungey v. Angove*, 2 Ves. jun. 304.

(*f*) *Cowlan v. Williams*, 9 Ves. 107.

(*d*) *Jew v. Wood*, 1 Craig. & Phil. 185.

(*g*) 1 & 2 Will. 4, cap. 58.

CHAPTER XII.

Of the Jurisdiction in general to grant Injunctions to stay wrongful Acts of a special Nature.

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| 1. Jurisdiction of Equity not ousted because there is a Remedy at Law. | 7. Injunctions to stay the Trading of Ships. |
| 2. Jurisdiction to interfere in Cases of Duress. | 8. Staying the improper Transfer of Stock. |
| 3. Jurisdiction to restrain the Marriage of Infants. | 9. As to Proceedings by and against the Bank. |
| 4. Jurisdiction as to Recognition of alleged foreign Governments. | 10. Injunctions to quiet Pastures. |
| 5. Injunctions in Matters of Sequestration. | 11. Injunctions against Ejectment. |
| 6. Actions brought in foreign Judgments. | 12. Injunctions to stay Sale. |
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UNDER this head I propose to refer to some cases, which do not appear strictly to fall under any of the general heads of equity which have been discussed in this part of the present essay, and which show more especially the nature and limits of the jurisdiction to interfere by injunction.

1. We have seen it incidentally decided in many of the cases cited, that the jurisdiction of equity to interfere by injunction, is not necessarily ousted because there may be a remedy at law. This question has been, in some cases, the principal point. In an early case in which it was discussed, it was settled that although a Court of Law may prevent a bond creditor from taking out execution beyond his just debt, that does not take away the jurisdiction of

equity to grant an injunction (*a*); *à fortiori*, where there is an equity of which a Court of law refuses to take notice.

In a case before Lord Eldon, A. being the creditor of B., assigned his debt to C., in order that C. might employ his brother, an attorney, to recover it as if for himself, a memorandum declaratory of the trust passing at the same time between A. and C.; C.'s brother did recover a sum of 1000 guineas from the debtor, and then having other transactions with A., brought an action against him for his bill of costs, refusing to account to him for the 1000 guineas; and after several proceedings in the Court of King's Bench, the Court ultimately refused to enter into the merits of the declaration of trust. This being the case made by the bill, which prayed an injunction against the attorney, the brother of C., to restrain him from continuing the proceedings against A., and from proceeding against the sheriffs, a general demurrer by the defendant was overruled, on the ground that the Court of law had pronounced an opinion that it could not try the equitable right; and a special injunction was granted to restrain the defendant from proceeding against the sheriffs (*b*).

But when a party is in possession of a ready furnished house, under an agreement for a lease for three years, and the creditor of the landlord obtains judgment against him, and the sheriff under a *fiery facias* enters on the tenement and seizes the furniture, equity will not grant an injunction to restrain the sheriff from removing or selling the effects during the term; for if the tenant has a possessory title, and if the sheriff has no right to seize, the remedy is at law (*c*).

And here may be repeated as a general rule of jurisdiction, a proposition which I have had occasion to state in reference to several particular cases, viz. that the Court will

(*a*) *Codd v. Wooden*, 3 Br. C. C. 73.

(*c*) *Gantin v. Asplin*, 1 Mad. 151.

(*b*) *Farquarson v. Pitcher*, 2 Russ. 81.

not grant an injunction in aid of an alleged legal right, where it lies so very doubtful whether such right will not fail in a Court of law (*d*).

2. That the Court has jurisdiction to interfere in cases of *duress* is undoubted (*e*); but it has refused to carry this so far as to restrain a husband, on a mere allegation of apprehended *duress*, from refusing to permit his wife to be seen while dangerously ill, by persons who, without specific instructions from her, had prepared a deed for her execution, for the purpose of exercising a power of appointment to the exclusion of the husband (*f*). It may seem somewhat extraordinary that such a proposition should ever have been made to a Court of equity, since in the first place the order asked would be in effect an order to compel the defendant to do an act, a kind of order which we have seen the Court disclaim jurisdiction to make directly in any case; and which it makes circuitously only in cases of irreparable mischief in the nature of destruction; and in the second place it would be difficult to show how, from the simple circumstance of a married woman having separate estate, an equity can arise in favor of her relations, entitling them to demand access to her, against the will of her husband, in the absence of clear and positive instructions from herself.

3. As incident to its custody of infants, the Court of Chancery exercises a control over their marriages by injunction: therefore the Court, to prevent the marriage of an infant ward, except under its control and direction, will enjoin the party proposing, from marrying such ward; and if the party is an infant, the guardian will be restrained from permitting the marriage (*g*).

And if an infant ward of the Court has been actually en-

(*d*) See *Whitchurch v. Hyde*, 2 Atk. 391.

(*f*) *Middleton v. Middleton*, 1 Jac. & W. 94.

(*e*) *Strithmore v. Bower*, 1 Ves. jun. 22, 2 Br. C. C. 345.

(*g*) *Smith v. Smith*, 3 Atk. 304.

trapped into a marriage, and there are doubts as to the validity of it, an injunction will be granted, pending a suit in the Ecclesiastical Court for determining that question, to restrain all the parties to the transaction from having any intercourse personally, by correspondence, or otherwise with the infant (*h*).

4. It is clear that a body purporting to be a foreign government cannot be noticed by the Court as a plaintiff, if it is not recognised by the government of this country (*i*). And it seems doubtful whether the Queen's Courts can interfere at all on the subject of contract between British subjects and a foreign government not recognised by this country (*k*). But it will, with a view to secure money for the parties who may be decreed to be entitled to it, interfere to restrain a department of the executive government of this country from doing a mere ministerial act (*l*).

And where the property of an English subject in France was sequestered during the French revolution, and came within the 59 Geo. 3, cap. 31, and the conventions between the governments of France and England for compensating English subjects whose property had been illegally confiscated; the Lord Chancellor thought it was within the jurisdiction of equity to interfere between parties setting up claims, one as executor, and another as next heir by the law of France; and to restrain the agent of one, who had received the compensation money, from paying it to his principal. The injunction was, however, refused, on the ground of the evidence being insufficient to show what was the law of France, and what was the title of the party claiming under it (*m*).

5. In a case where there were two incumbrancers on a rectory, and the one whose debt was posterior in point of

(*h*) *Warter v. Yorke*, 19 Ves. 454.

& Russ. 299.

(*i*) *City of Berne v. Bank of England*, 9 Ves. 347.

(*l*) *Ellis v. Earl Grey*, 6 Sim. 214.

(*m*) *Hill v. Reardon*, Jac. 84.

(*k*) *Jones v. Garcia del Rio*, 1 Turn.

time had taken out sequestration, the Court assisted the one whose debt was prior by granting a receiver, and restraining the party in possession under the sequestration, from collecting the rents and profits of the rectory, referring it to the Master to take an account of the incumbrances, and to ascertain their priorities (n).

In an earlier case where there were several creditors, and one had procured sequestration before the others, a similar course had been pursued; Lord Eldon at first refused to interfere, on the ground that it was not made out that the defendant's sequestration was fraudulent, and that the plaintiff did not make out, supposing the defendant's claim to be bad, that he the plaintiff was entitled to the possession, but could not avail himself of it at law. The receiver and injunction were afterwards granted until further order, but on what ground it does not appear by the report (o).

Where sequestration has been issued by the Court of Chancery for non-performance of a decree in a mortgage suit, and the defendants refuse to deliver up the mortgaged premises, an injunction will be granted to cause possession to be delivered (p).

And where sequestrators have entered and sequestered and are forcibly dispossessed, the party so dispossessing them will be committed, and an injunction to restore possession awarded (q).

To give sequestrators possession the course is, that after the sequestration, an injunction is granted, and then a writ of assistance (r).

The course to obtain possession of land in pursuance of a decree of the Court of Chancery is to obtain an order,

(n) *White v. Bishop of Peterborough*, 3 Swans. 109. The incumbrances in this case were created between 1803 and 1817, the period during which the 13 Eliz. c. 20, was not in force. It is clear that now beneficiaries could not be so charged. See 2 Jarm. Byth. 249 n., *note* and 8

Jarm. Byth. 255, *note*.

(o) 3 Swans. 112. n. (45).

(p) *Bird v. Littlehale*, 3 Swanst. 300.

(q) *Pelham v. Duches of Newcastle*, 3 Swanst. 289.

(r) *Bird v. Littlehale*, 3 Swanst. 299.

which is an order of course, that an injunction should issue, enjoining the defendant to deliver up possession; and on that is grounded a writ of assistance, to be executed by the sheriff in case of disobedience (*t*).

In the case last referred to a motion was made after the making of the order, for an injunction to stay the proceedings under the decree until an appeal should be presented to the House of Lords. Lord Eldon, on the particular circumstances of the case, stayed the proceedings, but said it had been settled by the House of Lords that an appeal to that House from a Court of equity does not stay execution of the decree (*u*), unless by special order of the Court of equity, or of the House of Lords; but in such cases it seems better that the special application should be made to the House of Lords (*x*). And in general it seems that an application to stay proceedings under a decree of a Court of equity from which an appeal is pending, should be made to the Court of appellate jurisdiction (*y*).

6. An injunction would be granted to restrain a banker from bringing an action against his customer on a foreign judgment, if it should appear that there have been a great many dealings and transactions, and no account delivered except an account by which the customer appeared to be the creditor of the banker for a particular sum (*z*).

7. Equity has, under circumstances, exercised jurisdiction to stay the sailing of ships. Thus a part-owner of an unascertained share of a ship has obtained an injunction to stay the sailing of the ship till his share could be ascertained, and the proper security settled (*u*). But it has been refused when the application was not made till the

(*t*) See *Huguenin v. Baseley*, 15 Ves. 180.

Macnaghten v. Boehm, 1 Jac. & W. 50.

(*u*) See order of the 12th Aug. 1807, 15 Ves. 184.

(*z*) *Bowles v. Orr*, 1 You. & Coll. 464.

(*x*) *Per* Lord Eldon, 15 Ves. 182.

(*a*) *Haly v. Goodson*, 2 Mer. 77.

(*y*) *Per* Sir T. Plumer, M. R.

(*b*) *Christie v. Craig*, *ibid.* 137.

day before the ship was to sail (*b*), and no sufficient reason given for the delay. And it was early held, that an injunction to restrain the sailing of a ship cannot be granted after appearance, without notice (*d*).

The Court has, however, refused to grant an injunction in a case where the plaintiffs were the East India Company, and sought to restrain the defendants from sailing ships in infringement, as it was alleged, of the East India Company's charter, although a verdict had been found against the defendants for past trading, and although they had put in an insufficient answer to the bill of discovery of the plaintiffs (*e*). It is very questionable whether at this day such a decision would be made.

In a case before Lord Eldon, the plaintiff moved for an injunction to restrain the defendants from dispatching goods then on board their vessel, which was on the point of sailing; and for an injunction against the Dock Company, in whose docks the vessel was lying, to restrain them from permitting the goods to be removed from the docks. His Lordship refused the injunction on the double ground that the Court has not jurisdiction to stop goods *in transitu*, and the danger of interfering in such a case. "If," he said, "a ship contains a cargo belonging to twenty-four persons, and A. B. has a right to part of it, am I, because he may bring an action of trover for the conversion of his property, to stop the ship from sailing with the goods of the other twenty-three? Consider the danger of interfering. If instead of this valuable cargo, there was only a single hogshead, the effect would be the same." On this case it may be remarked, that an injunction granted on the terms of the prayer of the bill, would not necessarily have restrained the sailing of the ship at the time fixed for its sailing: for the injunction prayed was merely to restrain the removal of the goods; and if according to the case put by the Court, there had been but a single hogshead on

(*d*) 2 Ves. sen. 112.

(*e*) *East India Company v. Interspersers*, 2 Ch. Ca. 165.

board the ship, the injunction might have been carried into effect without delaying the ship for a single hour. The real ground for Lord Eldon's decision appears to be the want of jurisdiction (*f*).

8. Equity interferes also by injunction under circumstances to restrain improper transfers of stock ; the relief in this class of cases does not seem to depend so much on any special jurisdiction, as on the general jurisdiction of the Court to restrain acts against good conscience and injurious to property. Thus in a late case, the wife of a bankrupt having an absolute power of appointment over stock standing in the names of trustees in this country, died in France, having disposed by will of these trust funds to her sister, who resided in France, and became her administratrix. The bankrupt before being made so, had remitted the proceeds of the sale of his furniture and other monies to France, and procured them to be invested there in his wife's name ; all of which had come to the hands of the administratrix, who continued to reside in France, so that the property of the bankrupt come into her possession in France could not be recovered. Under these circumstances the assignees of the bankrupt obtained an injunction to restrain the transfer to her of the stock in the English funds, on the ground that as that stock (under the terms upon which she took it) was her property, and subject to the payment of all debts to which she was liable ; and as the Court, for the purpose of the motion, thought the French stock was *primâ facie* to be considered as the bankrupt's property, the assignees were entitled to prevent the removal out of the jurisdiction of the property out of which the administratrix would be liable to pay the debts of her testatrix (*g*).

9. The Bank of England are not bound to look beyond the legal title to stock. If they were to be called upon to

(*f*) *Goodhart v. Lowe*, 2 Jac. & W. 349. (*g*) *Stead v. Clay*, 4 Russ. 550.

take notice of the trusts of a will at all, they must take notice of them throughout; there is no ground on which they can take notice to a certain point and no further. They cannot therefore restrain an executor, where there is no specific bequest of stock, from selling and transferring it into his own name (*k*).

And where it is doubtful whether a bequest of stock is specific, so as to vest it in the legatee, or whether it vests in the executor, and the Bank refuses to transfer it into the name of the executor, without proof of the death of the legatee; the executor will not be restrained from bringing an action against the Bank. For if the executor cannot maintain an action at law, the Bank does not want the protection of equity; and if the executor can maintain an action, then the true construction of the act of parliament (*l*) authorises or does not prevent the action, and then there is no equity (*l*).

In bills filed for an injunction to stay the transfer of stock standing in the books of the Bank of England, and to restrain the Bank from permitting the transfer, the Bank *may* be made parties (*m*); but it is not necessary to make them so (*n*); and the bill may be filed against the parties in whose names the stock stands alone, and the motion must be made upon notice to the party, unless, in consequence of special circumstances, notice cannot be given, and then the application must be on affidavit, verifying that such urgency and necessity exist (*o*). To move as a matter of course without notice or affidavit is irregular. And it seems, by a *dictum* of Sir John Leach in *Edridge v. Edridge* (*p*), that if the Bank has been unnecessarily made a party, the bill will be dismissed as

(*k*) *Bank of England v. Pearson*, 5 Ves. 665.

(*l*) 1 Geo. 1, stat. 2, c. 19, s. 11, 12.

(*m*) *Bank of England v. Lunn*, 15 Ves. 569.

(*n*) *Temple v. Bank of England*, 6 Ves. 769.

(*o*) 39 & 40 Geo. 3, c. 36.

(*p*) *Harrison v. Mansfield*, 6 Ves. 769.

(*q*) 3 Mad. 386.

against it, with costs. This case is referred to as of authority in a late very able work (*q*), and I am not aware of any decision overruling it.

Where a party files a bill, praying, amongst other things, an injunction to restrain the Bank from transferring stock, and the answer denies the plaintiff's title, the Court will not, on motion by the defendant, decide the point by ordering the Bank to permit the transfer; but if the Bank is served with a subpoena, and notice of the bill and its object, that *operates as an injunction against the Bank*; and if the plaintiff does not apply for an injunction, the proper course it seems for the defendant, is to move that the Bank shall be at liberty to permit the defendants to transfer the stock, and the Court will make an order permitting such transfer on a given day, unless, in the mean time, an injunction shall be granted (*r*).

10. Anciently there was a practice of granting injunctions to quiet the possession until the hearing; that is, to prevent the party who was out of possession, from forcibly disturbing the possession of the other, pending a suit to determine the right (*s*); or, if forcible possession had been taken, to avoid it (*t*). It was necessary to warrant an injunction of this nature, that the party asking the relief should have been, at the time of the bill being filed, and for three years before, in peaceable possession.

This practice has entirely fallen into disuse in England, and there has been no instance of such an injunction since a case of *Hughes v. Trustees of Morden College*, decided in 1748 (*u*). In that case Lord Hardwicke granted an injunction to restrain the commissioners of a turnpike-road, who had agreed with the trustees of Morden College for liberty to dig for gravel on land which was on lease for

(*q*) 1 Daniell Chan. Prac. 200.

Lapcote v. Newport, *ibid.* 47.

(*r*) *Ross v. Shearer*, 5 Mad. 458;

(*t*) *Hawkes v. Tinnit*, Cary, 36.

Birch v. Corbyn, 1 Br. C. C. 571.

(*u*) 1 Ves. sen. 187.

(*s*) *Dowche v. Perrot*, Cary, 45;

twenty-four years, and used as garden ground, from forcibly entering and digging up the vegetables to obtain gravel. The Lordship treated it as a case of trespass, and expressly held, "that indeed there was a trespass at law, but that would be only for the wrong done, and not equal to the remedy in equity."⁶

It is unnecessary to pursue this subject any further, as it is extremely improbable that the practice of granting injunctions for quiet possession, on the equity of having been in possession for three years, should be revived, so long as the Court continues to exercise the jurisdiction of granting injunctions against trespass in the nature of waste. It is indeed highly probable that the adoption of the latter practice was the cause of the suspension of the former; for independently of the circumstance that the relief against trespass in the nature of waste answers all the purposes of the injunction to quiet possession, it may be observed that the establishment of the former practice is about coeval with the cessation of the latter *et c.*

The learned reader who wishes to see more on this subject, is referred to Lord Henley's *Treatise* (2).

11. When an ejectment is brought against a tenant, the landlord may make himself defendant to the action, and then he may at once file his bill and get either an answer, or in default of appearance or answer, the common injunction; or he may file a bill for an injunction before he has been admitted to defend the action, making the tenant a party (*y*). But he cannot let the action go on for judgment against the tenant, and then come into equity for an injunction to stay execution (*z*).

When parties accept a lease, they cannot, because an ejectment is brought against them by other parties, obtain

(*y*) *Hughes v. Mordaunt* (see note to 1741). *Thames Coal Trust* have occurred between 1776 and 1783.

(*z*) Page 302.

(*y*) *London v. Waller*, 3 Swansb. 142; *Mait v. Lewis*, Jac. 302; *Paine v. Marsh*, 5 Sim. 528.

(*z*) *Mait v. Lewis*, Jac. 302.

an injunction to stay their landlord from distraining for rent till the trial of the ejectment; for they cannot be allowed by such means to bring the landlord's title into disrepute (*a*), even though the landlord should have demised premises which he had no right to let. But where A. granted a lease of freehold and copyhold, being only tenant for life of the freehold, but the two were intermixed, the representatives of the tenant for life were restrained from taking out execution on a verdict found for them in ejectment, until the hearing, as the ejectment would not inform the Court on the material point, viz. the locality of the lands (*b*).

12. Equity will sometimes interfere to stay a sale, although it may turn out ultimately that it would not be improper. As for instance, where there has been a decree for the plaintiff with directions for a sale, and the decree is appealed from, the sale will under special circumstances, and on the terms of the defendant giving ample security for the value of the property, be stayed until the hearing of the appeal; or where a vendor has power to sell, but it is questionable whether the sale is made properly in pursuance of the power. Thus in a case where Commissioners under an inclosure act had powers to sell, a sale by them was stayed on an *ex parte* motion before appearance, the case made by the bill being, that the Commissioners were about to sell a pond, part of the common lands, to a person not entitled under the act to be a purchaser, and at a price far below the real value of the property; and that the pond was of special value to the inhabitants having right of common, for the purpose of supplying them with pure water (*c*). It may be observed here that the bill was by one proprietor on behalf of himself and all others.

So where the thing about to be sold is in the nature of a

(*a*) *Homan v. Moore*, 4 Price, 5.

(*c*) *Hawes v. James*, 1 Wils. 2.

(*b*) *Hardcastle v. Shaft*, 1 Anst. 184.

specific chattel, at which the defendant was about to sell diamonds to which the plaintiff claimed title, he was restrained by *an ex parte injunction*(*d*). And where great mischief may be the consequence of the sale, and notice will arise from restraining it, as where a bankrupt showed that another person was willing to pay all his debts and costs, and prayed by the bill for a suspension, a sale advertised by the assignees for the following day was stayed till further order, the petitioner undertaking not to remove or dispose of the property in the mean time(*e*). And Lord Eldon has laid it down, that where there are sufficient allegations pending a suit, the Court will restrain them(*f*).

So where the defendant had entered into a parcel agreement to exchange estates with the plaintiff, and the latter by his bill, supported by affidavit, alleged part performance on his side, and charged that the defendant had advertised his estate for sale, an injunction was granted before answer, restraining the sale, although the plaintiff might appear at the sale and give notice of his claim(*g*).

But trustees for sale will not be restrained by the owner of the estate from selling, merely on the allegation that they are about to sell prematurely, where no case is made of irreparable injury; for if the trustees sell in such manner as to commit a breach of trust, they will be liable(*h*).

So where a special authority to sell has been given to a person, even if it is doubtful whether such power is not revoked at law, yet if it is not revoked in equity, an injunction will not be granted. In *Harcourt v. Rambottom*(*i*), the plaintiff being indebted to the defendant, a judgment had been obtained against him for upwards of 29,000*l.*, and other proceedings took place establishing the fact that there was a large balance due from him, on which he agreed to a reference to arbitration, and in pursuance of

(*d*) *Teevan v. Pratt*, Dick. 307.

(*e*) *Ex parte Figgis*, 1 Glyn & Jav. 122.

(*f*) 4 Dow, 440.

(*g*) *Curtis v. Marquis of Buckingham*, 5 Ves. & B. 109.

(*h*) *Fether v. Fower*, 2 Azar. 549.

(*i*) 1 Jac. & W. 565.

the agreement executed a conveyance of his estate, containing a power of sale within two months after the award. After the arbitrator had acted, the plaintiff taking part in the proceedings, he revoked the agreement to refer, and the appointees and nominees under it. The arbitrator after that made his award, and the plaintiff then came for an injunction to restrain a sale under the power. It was contended that he could revoke the agreement to refer, at any time before the award, and also that the arbitrator was not properly chosen. But the Lord Chancellor said, however that might be, the parties having acted under him had admitted that he was qualified. And whether the authority to the arbitrator was revoked or not at law, it was not revoked under the circumstances in equity, so as to call for the interposition of the Court to say the award was not good in equity.

Neither will an injunction be granted to restrain a voluntary settlor from selling (*i*). For although the settlor cannot himself maintain a bill for specific performance of a contract to sell (*k*), yet as a voluntary settlement is void as against a purchaser for valuable consideration, though with notice (*l*), equity will enforce the contract for purchase against the settlor (*m*). In *Pulvertoft v. Pulvertoft* (*n*), a distinction was attempted to be taken between the case of an actual purchase made, and the case where the settlor has not actually sold, but is about to sell; and it was contended that equity, though it will not undo the act done, ought to interfere to prevent a man who had made a voluntary settlement as a provision for his wife and children, from defeating it by a sale. But the Court, on the authority of *Evelyn v. Templar* (*o*), as well as on the general doctrine, dissolved the injunction which had been granted, expressing regret that it had ever been granted.

(*i*) *Pulvertoft v. Pulvertoft*, 18 159.

Ves. 84.

(*m*) *Ibid.*

(*k*) *Smith v. Garland*, 2 Mer. 123.

(*n*) 18 Ves. 84.

(*l*) See 2 Sug. Vend. & P. 9th edit.

(*o*) 2 Bro. C. C. 148.

An injunction was granted in an early and anonymous case to restrain a husband from selling his wife's term, where they were divorced *a mens et dies*, and the wife had alimony for her support (*p*). It is impossible to see on what principle this injunction could be supported, as there is no rule better established than that a husband may sell his wife's term.

If a mortgagor has in himself a power of sale, he will not be restrained from proceeding to a sale because he has not given due notice to the mortgagee. For the mortgagee can protect his own interest by giving notice to the purchaser, that he has filed a bill to impeach the sale (*q*). But if the power of sale is in a trustee, the Court will enjoin him, because it is his duty to attend equally to the interest of both his cestuis que trust, and to apprise both of the intended sale (*r*).

Where a judicial sale of a mortgaged estate has been effected under the process and judgment of a Colonial Court having competent jurisdiction, and no case of fraud made out, equity has no jurisdiction to interfere by injunction (*s*).

An equitable mortgage of copyholds may be created by a deposit of copies of the Court rolls (*t*). And where a party made such an equitable mortgage, and afterwards made a legal mortgage of the same premises, the second mortgagee having no specific notice of the equitable mortgage, but having notice of the fact that the mortgagor was indebted, and had given some security to the first mortgagee, an injunction till the hearing was sustained against the mortgagor and second mortgagee, who had sold the premises, to restrain them from demanding or receiving the purchase money, or conveying the premises (*u*).

14. A perpetual injunction is in effect a decree; it is the

(p) *Ann.* 9 Mod. 41.

(q) *ibid.* 6 Mod. 10.

(r) *ibid.*

(s) *White v. Hall*, 12 Ves. 321.

(t) *Ex parte Warner*, 19 Ves. 202;
Whitbread v. Jordan, 1 Y. & Coll. 303.

(u) *Whitbread v. Jordan*, 1 Y. &
Coll. 303.

ultimate object of, and is grantable in many suits, such as suits for restraining the infringement of copyright, of patent rights, and the like; but in such cases it is rarely applied for, because those suits rarely go on to a hearing; and the ordinary injunction till further order being sustained, usually answers the purpose of sufficient protection for the plaintiff.

The perpetual injunction is in fact seldom resorted to, except for the purpose of putting an end to vexatious litigation in cases in which without it, it would be open to the defendant to renew litigation after the case has received that sort of repeated or full decision, that entitles the plaintiff to be protected against further trials of the right. Thus if a trust estate be devised to be sold, and on a bill brought against the trustees to sell, the heir contests the will, after two trials the Court will grant a perpetual injunction. So where there have been two ejectments to try a title under an entail, and verdicts in favour of the defendant at law, and then two trials at bar, and verdict for the plaintiff; or where there have been several ejectments, and in all, verdicts for one, a perpetual injunction will be granted(y).

Again, where there has been a verdict in favour of a will, on an issue of *devis. vel non*, then a decree in the cause in Chancery establishing the trusts of the will, and they have under the decree been carried into effect; an ejectment by the devisee of the heir at law will be restrained by perpetual injunction(z).

But a perpetual injunction will not be granted except after some repeated or otherwise conclusive decision of the right. In a case before Lord Keeper North, his Lordship said that the inheritance ought not to be bound on a decree where there has been but one trial(a). And Lord Hardwicke has laid it down that perpetual injunctions are

(y) See *Leighton v. Leighton*, 1 P. W. 671, and the cases there cited.

(a) *Fitton v. Macclesfield*, 1 Vern. 293; and see 2 Ves. sen. 553.

(z) *Lowe v. Joliffe*, Dick. 388.

never granted to restrain ejectments until after many trials, to prevent vexation arising from the method of trying titles by ejectment (*b*).

A bill by a lord of a manor to establish his mere legal title and for a perpetual injunction cannot be sustained where there is no such ground as to prevent vexatious litigation, and nothing to prevent his trying the title at law (*c*).

It seems scarcely necessary to point out, that where a perpetual injunction has been granted, and the plaintiff dies, it is not necessary or proper to revive it for the purpose of sustaining the injunction. For if it were so, a perpetual injunction would be an order for a perpetual suit; and besides, the usual order on abatement of a suit, that the plaintiff may revive or the injunction be dissolved, shows that on abatement, the injunction is not *ipso facto* gone (*d*).

And when a defendant is in a condition to dismiss the bill for want of prosecution, the fact of an injunction having been granted until answer, and not discharged, will not render the order to dismiss irregular. For if it were, that would be to treat the injunction as perpetual, and the Court never grants a perpetual injunction till the hearing (*e*).

(*b*) Rule, 191.

(*d*) *Asken v. Townsend*, De 3, 471.

(*c*) *Wells v. Duke of Rutland*, 5
Hos. P. C. 39.

(*e*) *Day v. Snee*, 3 Ves. & Bea.
170.

PART III.

OF THE PRACTICE IN MATTERS OF INJUNCTION.

CHAPTER I.

OF THE MODE OF OBTAINING INJUNCTIONS.

SECTION I.

As to Injunctions to stay Proceedings at Law.

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21. Wherever an Injunction is prayed	injunction where the bill is deferred
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common Injunction Proceedings at	mons: 1. Petition: Money due
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24. Objections to the Petition of Com-	mons.

1. AN injunction to stay proceedings at law will not be granted in general until a bill has been filed (*a*). Lord Henley, in his work on Injunctions, mentions some old cases in which a contrary practice has been allowed, but he concludes by observing that they are precedents which would not now be followed (*b*). And the practice is firmly settled as above stated, except in certain cases, which will be presently discussed.

2. Generally also an injunction cannot be granted against a person who is not a party to the suit. At where the common injunction was obtained by the acceptor of a bill against the holder, the holder then returned the bill to his indorser, who commenced a fresh action. An injunction was refused against this second plaintiff, as he was not in the cause, nor any injunction prayed against him (*c*).

3. It follows from the very nature of the *common* injunction, that it can never be obtained, except where a bill has been filed (*d*). And the bill must expressly pray an injunction (*e*), and that as well in the prayer of process as in the prayer for relief (*f*). But where a bill prayed for an injunction in the prayer for relief, but not in the prayer of process, and was afterwards amended by adding the

(a) Beam. Ord. 12, 35, 214; 4 Inst. 92, 1 Vern. 156, 1 Smith's Pract. 586.

(b) *Lien on Injunc.* 45.

(c) *Dutton v. Prosser*, 2 Anst.

521, see also 7 Vet. 256.

(d) See the definition of the *common* injunction, Introduction, *ante*.

(e) *Sastry v. Dyer*, Anst. 70.

(f) *Wood v. Beadell*, 3 Sm. 273.

prayer for an injunction in the prayer of process, it was held that that was not such an amendment as would make it necessary to wait for default in answering the amended bill, before a motion could be made for an injunction. But the motion was allowed to be made forthwith on the merits confessed in the original answer (*g*).

It must be remembered that it is a general rule that upon an original bill, the plaintiff cannot have the common injunction, until some default by the defendant, either by not appearing or not answering, the time in either instance having expired (*h*).

4. Subpœna to appear is generally to be served in injunction suits, in the same manner as in other suits. There are, however, a few points of practice on this head relating more particularly to injunctions, which deserve notice. For instance, although in general the subpœna to appear must be personally served, yet it was early laid down that where the defendant is abroad, and an injunction bill has been filed, service of the subpœna on the defendant's attorney will be good service; but an affidavit of the truth of the equity of the bill must accompany the motion for such substituted service (*i*). In a later case, indeed, it was held that the affidavit of merits need not accompany the motion for substitution of service, and that it is sufficient if it accompany the motion for the injunction (*k*). But this case has been since overruled, and the practice is now well settled to the contrary, in conformity with *Delaney v. Wallis* (*l*). But the Court will not go further than thus to order substituted service, and will not grant an injunction until there is default either in appearing or answering.

(*g*) *Wood v. Beadell*, 3 Sim. 273.

(*h*) 18 Ves. 523.

(*i*) *Delaney v. Wallis*, 3 Br. C. C. 12.

(*k*) *Burke v. Vickars*, 3 Br. C. C. 24.

(*l*) *Stephens v. Cini*, 4 Ves. 359; *Anderson v. Darcy*, 18 Ves. 447.

The affidavit of merits must in general be made by the plaintiff himself. It will not do it made only by his solicitor, unless he has personal knowledge of the merits (*m*).

5. When the bill has been filed, and the subpoena to appear regularly served, the plaintiff may obtain the common injunction on the defendant making default in not appearing; or having appeared, in not answering within the times respectively prescribed for those steps by the practice of the Court.

If the defendant does not appear within four days in a town cause, or within eight days in a country cause, then on an affidavit of the due service of the subpoena, the plaintiff's clerk in Court seals an attachment for want of appearance. The defendant being then in contempt, the plaintiff may immediately, without waiting until the attachment is executed, move for an injunction as an order of course (*n*).

6. The motion for the common injunction, for default of appearance or answer, may now be made on any day on which the Court is sitting, whether in or out of term. Formerly the practice was otherwise. It was held that out of term a motion for a common injunction could only be made regularly on seal days (*o*). This was modified afterwards, by holding that the order must be obtained on any day out of term to which the seal was adjourned (*p*). Of late years it has been the general practice to obtain such orders on any day out of as well as in term (*q*), and this practice has been finally recognized and adopted in a very late case, in which the point was expressly raised

(*m*) *Keworth v. Accuser*, 3 Mad. 550.

(*n*) See 1 Smith's Pract. 602.

(*o*) *Ross v. Jarrold*, 5 Mad. 45.

(*p*) *Brierley v. Walsley*, 1 Keen, 141.

(*q*) See 2 Dan. Pract. 96.

and determined, as to an injunction for want of appearance (*s*); and the distinction formerly taken (*t*), that, in order to be entitled to the common injunction on a day out of term, to which the seal might have been adjourned, it was requisite to have been in a position to move on the seal day, is not now attended to (*u*).

If, in a suit for an injunction to stay proceedings at law, the defendant having appeared, does not plead, answer, or demur within eight days after appearance, the plaintiff is entitled, as of course upon motion, to the common injunction (*v*). The order recites, as the ground of granting the common injunction, that the defendant has omitted to put in his answer, plea, or demurrer, within the time limited by the Court (*x*).

7. But it has been decided on the tenth order (1833) (*y*), that although the plaintiff may regularly obtain the common injunction, if the defendant do not plead, answer, or demur within eight days after appearance, yet the defendant has twelve days to demur alone. And therefore it is not irregular for the defendant to demur within the twelve days, although it should be after an order for an injunction

(*s*) *Earl of Chesterfield v. Bond*, 2 Beav. 263.

(*t*) *Rowe v. Jarrold*, 5 Mad. 45.

(*u*) *Earl of Chesterfield v. Bond*, 2 Beav. 263.

(*v*) 10 New Ord. 1833.

(*x*) 11 New Ord. 1833.

(*y*) The 10th Order of 1833 is to the effect, "That in every cause where an original or supplemental bill or bill of revivor has been filed subsequent to the 25th day of November last, or shall hereafter be filed, the defendant shall, after appearance and without order, be allowed eight weeks in a town cause, and ten weeks in a country cause, to plead, answer, or demur, not demurring alone, to any such original or supplemental bill, or

any such bill of revivor, to which an answer has been required; and five weeks in a town cause, and seven weeks in a country cause to plead, answer, or demur, not demurring alone, to any amended bill, to which the plaintiff shall require an answer; but that twelve days only shall be allowed a defendant to demur alone to any such original, amended, or supplemental bill or bill of revivor. And in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled as of course upon motion to such injunction."

obtained against him for not having pleaded, answered, or demurred within eight days: and if the demurrer should be allowed, the bill would be out of Court, and the injunction would fall to the ground (c).

Here it may be observed that, an injunction to stay proceedings at law is granted as of course on a demurrer being averred (d).

8. Where a bill is referred for impertinence, the rule as to obtaining an injunction for want of answer, is not generally that the reference for impertinence stays all proceedings, but only that the plaintiff cannot obtain the injunction as of course for want of answer; he is in the same position as if the time for answering were not out, and must move for the injunction on notice and affidavit of circumstances (b).

9. Where a bill is referred for scandal, and is reported scandalous, no motion can be made on it for an injunction until the scandalous matter is expunged: for till then it is not known what the bill is, and the defendant cannot answer it (e).

10. Where a plaintiff takes exceptions to the answer and they are allowed, but before the Master's report is filed the defendant puts in a further answer, it is irregular to obtain the common injunction for want of answer. And it seems that to move in such a case is irregular on a double ground: 1st, because of the Master's report not being filed; and secondly, because of the further answer (f). So where an answer was reported insufficient, and the defendant on the same day swore his further answer at the

(c) *Paul v. Marsh*, 7 Sim. 521.

(b) *Bottle v. Ball*, De K. 153.

(f) *Smith v. Wade*, 1 Br. C. C. 573, 1 Cox, 104.

(e) *Davenport v. Davenport*, 6 Mad.

251.

(d) *Wynn v. Jackson*, 2 Sim. &

St. 226.

Master's house, and filed it the same evening, it was held irregular to obtain the common injunction for want of answer on the next day. But if the defendant had waited till the Master's office was closed, and had then gone to his house to swear the answer, and had not filed it till next morning, the injunction would have been regular (*d*). And it must be observed, that insufficiency of an answer is not of itself ground for continuing an injunction ; it must be excepted to, and then, if it be reported insufficient, application made to revive.

11. In *Kingham v. Maisey* (*e*), an injunction was granted to restrain proceedings at law by one defendant against a co-defendant. And in *Edgecumbe v. Carpenter* (*f*), an order was made on the special circumstances of the case (*g*), on the application of a defendant, to stay a co-defendant from proceeding with an action.

12. An injunction to stay proceedings at law cannot, except under very special circumstances (*h*), be granted before answer, unless the defendant is in contempt (*i*).

And this rule is so strong, that in a case where on the eve of the vacation a party was proceeding at law on a judgment obtained on a bond twenty-four years before, a motion to restrain him on bill filed and affidavit was refused (*j*). In the case referred to, a case of *Isaac v. Humpage* (*k*) was cited as an authority for a contrary practice, but that case has been repeatedly overruled on that as well

(*d*) *Duckworth v. Houlcott*, 3 Swan. 266.

(*e*) 2 Sim. 41.

(*f*) 1 Beav. 171.

(*g*) See *ante*, p. 37.

(*h*) *Vide post*, sects. 13, 14, 15.

(*i*) It is stated as the practice in a very early case (*Anon.* 2 Freem. 6), that an injunction to stay proceedings at law is never granted on bill filed and affi-

davit, till the defendant prays a *dedimus*, or is in contempt. This shows that at that period an injunction to stay proceedings at law was not in general to be had before answer, unless there was some default in the defendant.

(*j*) *Lane v. Williams*, 6 Ves. 798.

(*k*) 1 Ves. jun. 427.

as on other points (*l*), and the practice is finally settled as above stated.

13. The cases of exception are not very numerous. In one the circumstances were these:—a contract was subsisting between mortgagor and mortgagee for the purchase by the mortgagor of the mortgaged premises; the mortgage money not having been paid, and the contract still pending, the mortgagee brought an action for the mortgage money, and was pursuing process of outlawry against the mortgagor, who was abroad, without any previous communication to him or to his solicitor. The Court granted a special injunction to restrain the plaintiff at law from proceeding in his action and process of outlawry, holding this to be a case within the principle on which the Court has jurisdiction to restrain proceedings at law by special injunction, where a case is made showing that it is impracticable to obtain a common injunction in time to be of any use to the plaintiff (*m*).

So on the ground of irreparable mischief, an *ex parte* injunction will be granted to restrain a person from interfering with a testator's assets, and from proceeding at law against debtors, where he is alleged by the bill to have improperly obtained probate, and to be insolvent. Of course the allegations of the bill must be verified by affidavit, and there must be also affidavit of service of subpoena on the defendant, and the plaintiff will be required to bring into Court the money sought to be recovered at law (*n*).

Where some of the defendants are abroad, an injunction to restrain an action will not be granted before appearance or default of appearance of such defendants (*o*); but it has been held, that if a bill to stay proceedings at law by the

(*l*) See the note in 1 Ves. 431.

(*m*) *Drummond v. Pigou*, 2 My. &

K. 168.

(*n*) *Mansfield v. Shore*, 3 Mad. 100.

(*o*) *White v. Klevors*, 18 Ves. 471.

attorney of a party abroad, is filed against the principal and attorney, and the attorney answers, an injunction will be granted, on the money being paid into Court, to stay execution by the attorney, until the principal answers (*p*).

Where the common injunction had been obtained against A., who answered, but did not move to dissolve, and then the bill was amended, and A. died; some time afterwards the executors of A. proceeded at law against the plaintiffs, who filed a bill of revivor against them, but from the cause being a country cause, it happened that the defendants would be in a condition to obtain judgment, and take out execution upon it before their time for appearing would expire; and it appeared that the answer of A. contained admissions which would have entitled the plaintiff to an injunction as against A. himself;—on affidavit of these facts, notice of motion having been served on the defendants, who did not appear to oppose the motion, Lord Eldon granted an injunction to stay execution (*q*).

And so an injunction has been granted on certificate of bill filed and affidavit of merits before answer, to restrain the defendant from taking out execution on the plaintiff's warrant of attorney to confess judgment, where the motion was made during the vacation, and therefore no subpœna returnable till the next term (*r*); the plaintiff undertaking to serve the defendant with immediate notice. But in the Exchequer a motion of a similar nature was refused (*s*).

And an injunction will not be granted before answer or default to restrain suing out execution on a judgment obtained at law, on the mere ground that the defendant would be entitled to sue out execution before the plaintiff could obtain the common injunction; it must be shown that the

(*p*) *Wright v. Nutt*, Dick. 691.

(*r*) *Annesley v. Rookes*, 3 Mer. 226.

(*q*) *Turner v. Wright*, 1 Jac. &

(*s*) *Naylor v. Christie*, 8 Pri. 534.

W. 290.

plaintiff has had no opportunity of obtaining the common injunction (c).

Thus where under a special jurisdiction, as for instance the trials at the great sessions of the Welsh counties, the proceedings would go on so rapidly in execution, that under the circumstances of the particular case, it would have been impossible to obtain the common injunction in time to be of any use to the defendant at law, an injunction to stay such proceedings at law was granted *ex parte* on affidavit of circumstances, which, if true, would make a case for relief in equity (d), the plaintiff in equity giving judgment in the action, with stay of execution, the judgment to be dealt with at the discretion of the Court of equity.

And in a case before Sir J. Leach, V. C. (e), where it appeared that under the circumstances it was impossible for the plaintiff in equity to obtain the common injunction before the trial of the action, a special injunction was granted.

11. But although under circumstances, the effect of the General Rules of Practice at Law of 1834, on the General Orders in Chancery of 1833, may be to prevent the plaintiff in equity from having sufficient time to obtain the common injunction, and then to move to extend it to stay trial; yet the Court will not on that account merely, grant a special injunction before default to stay trial; because in the Orders in Chancery of 1833, the then forthcoming alteration in the practice of the Courts of law was contemplated; and though some of those orders related to injunctions, they did not provide for any alteration in the practice of Chancery respecting them (f).

(c) *Evered v. Dumas*, 3 Mer. 229.

(e) *Ames v. Farmer*, *Eden v. Bell*, Ryan, 405.

(d) *Hunt v. Fildes*, 2 Sim. & Sta. 270.

(f) *Barth v. Henson*, 7 Sim. 600.

The learned reader will, on consideration, perceive that these decisions are not inconsistent, as the two cases are clearly distinguishable. In *Hinde v. Fiddes*, the impossibility of the plaintiff's obtaining the common injunction in time to stay trial, arose out of a special and fortuitous combination of dates, and there was nothing to induce the Court to conceive that any such effect could have been in the contemplation of those who had laid down the practice. Whereas in *Bailey v. Weston*, the impossibility was a direct consequence of the General Orders of the Court of Chancery, framed with full knowledge of the rules of the Court of common law; and therefore it was not to be inferred that the Court, in framing its general orders, was unaware of and intended to avoid such consequences as those which occurred in *Bailey v. Weston*.

15. In a case where A., the obligor of a bond, moved for a special injunction to restrain B., the obligee, and C. and D., the assignees of the bond, from proceeding in an action brought by C. and D. in the name of B., none of the answers being put in, nor any of the defendants being in default; it was contended, in support of the motion, that this was a case in which the plaintiff was entitled to ask for a special injunction, because the common injunction restrains only the plaintiff at law, and not those who are suing in his name; and it was urged that according to the decision in *Montague v. Hill* (y), the answer of B., the nominal plaintiff at law, could not be used, and therefore to have the common injunction for want of an answer, which when obtained could not be used, would be absurd. But the Court refused the motion, and said, all that was decided in *Montague v. Hill* was, that where the common injunction has issued against the party in whose name the action was brought, and *he had put in his answer and the*

(y) 4 Russ. 128.

assignees had put in theirs, their answer is to be read, and his disregarded. But that afforded no foundation for the proposition that a plaintiff in equity is entitled to move for a special injunction to restrain proceedings at law, *before the putting in of any answer* (2). This decision was referred to and approved by the Lord Chancellor in *Thorpe v. Hughes* (3).

16. Where a receiver in a cause had absconded and his recognizances were forfeited, and an action had been brought against the surety, an order was made by consent for a reference to the Master to see what was due from the receiver, and that the surety might pay the same by instalments, and that the proceedings at law should be stayed; the surety paying the costs of the motion, and of the subsequent proceedings in consequence thereof (4).

17. When a bill is filed for discovery and an injunction against proceedings at law, and the bill is demurred to, the common injunction ought not to be granted pending the demurrer (5); for when the defendant demurs, he informs the Court that there is no equity in the bill. The course is that the Court will order the demurrer to be argued immediately. But although in general, where an injunction bill is impeded by a demurrer, the Court will advance the demurrer where pressing reasons are shown for doing so (6), because until the demurrer is disposed of, the injunction cannot be obtained; yet it will not be done if there is great delay unaccounted for: as for instance, where the bill was filed in respect of the assets of a testator three years after his death, and no reason given why it was not filed sooner; although in this case it was sworn that there was a con-

(2) *Lord Portarlington v. Graham*, 5 Sim. 416.

(3) 3 My. & Cr. 753, 759.

(4) *Waller v. Wylly*, 1 Mad. 528.

(5) *Constant v. Smith*, 11 Ves. 164.

(6) *James v. Taylor*, 2 Mad. 161; see 13 Ves. 167, and 2 Aik. 113; 3 P. Wms. 395, as to a plea.

siderable sum of money in the defendant's hands, and a dispute in the Ecclesiastical Court as to probate, and danger of the money being lost (*e*).

A demurrer to a bill for an injunction being overruled, the plaintiff is placed in the same situation as if default of appearance or answer within the proper time had been made, and may move for an injunction (*f*). In the case referred to, it was said that the plaintiff's right to move would be subject to this, that if it be out of term, he could only move on a seal day; but on this point it is apprehended that the modern practice of moving on any day, in or out of term, would now prevail.

18. An injunction will not be granted to stay execution after a verdict obtained at law, when the plaintiff in equity has had an opportunity of defending himself at law, unless the case is extremely clear to show that the verdict was against equity. And where the case was, that a party, having been a partner in a firm, had by letter given notice to the bankers of such firm not to honor bills drawn by one of the firm in its name, an injunction to restrain execution, on a verdict obtained by the bankers against the plaintiff upon a bill so drawn, was refused, as it did not appear that the judgment had not been deliberately given (*g*).

On this subject Lord Eldon said, in *Rowe v. Wood* (*h*), "that in general an injunction is never granted to stay execution, except for want of appearance or answer. The parties ought to have applied sooner; and it would be extremely mischievous to grant the writ in favor of persons who have lain by so long. An injunction is not granted to stay the sheriff from selling property taken under an execution, unless it had been previously obtained against

(*e*) *Jones v. Taylor*, 2 Mad. 181. 227.

(*f*) *Claughton v. Hadwell*, 6 Mad. 299.

(*h*) *Ibid.* p. 234, n. See also *O'Donnell v. O'Donnell*, 1 Hog. 176.

(*g*) *Protheroe v. Forman*, 2 Swan.

the defendant to stay execution; and the sheriff thus enjoined must sell under subsequent execution, unless the plaintiff will voluntarily forego. In a special case, however, an injunction has been obtained to stay execution, as where a warrant of attorney had been obtained by fraud.*

19. The common injunction to stay execution, and the extension of it to stay trial, cannot be obtained on one motion (v). A case of *Wright v. Hridge* (b) is usually referred to as an authority for this rule: that case appears, however, by Mr. Bell's note, to have been an injunction in an administration suit, on the motion of the executor. Mr. Bell mentions the case of a motion for an injunction in a creditor's suit to stay proceedings at law, as an exception to the general rule of practice; but it is submitted, that it is not properly an exception, and in truth has nothing to do with the general rule, which applies only to the common injunction sought to be extended to stay trial; whereas the injunction granted in a creditor's suit is in the nature of a special injunction, being granted without reference to the question whether the defendant is or is not in default; and if granted at all, always stays all further proceedings.

20. A writ of execution binds the property in the debtor's goods only from the delivery of the writ to the sheriff (l); where, therefore, the goods of a partnership were taken in execution for the debt of A. one of the partners, but he died before the writ was delivered to the sheriff, it was held that as the goods were vested in the surviving partners by the death of A., they were not bound; and an injunction was sustained to restrain the sheriff from removing the goods (m).

There is no doubt that if execution has been executed

(v) *Garlick v. Pearse*, 10 Ves. 450.

(l) 29 Car. 2, c. 3, s. 16.

(m) *Newell v. Townsend*, 6 Sim.

(b) 3 Br. C. C. 47, edit. Bell.

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before an injunction can be obtained, in a case in which the Court will interfere after execution executed, the Court must set the matter right; but cases in which it will so interfere are special (*n*). If the execution has been against the goods, although the sheriff may proceed to sell them, the Court in a special case will stay the money in his hands (*o*); and if the execution is against the body, the Court will also interfere and deliver the party, taking care to place him in such a situation that he shall not be at liberty to say he has satisfied the execution (*p*). In a case before Lord Eldon, a verdict had been found for the plaintiff, and the defendant at law was taken by the sheriff; afterwards he was discharged by a judge's order, on payment of the amount of the verdict into the Court of law; and after that, the defendant at law obtained the common injunction staying execution. The Court refused to discharge the order for the common injunction, and made an order that the plaintiff should apply to the Court of King's Bench for the money paid by him into that Court, and that when received, the same should be paid into the Court of Chancery, to abide the event of the cause (*q*).

In a case in *Vernon*, after judgment in ejectment and execution awarded, the under-sheriff refused to execute it; and for this, process of contempt in the King's Bench was commenced against the under-sheriff. Afterwards the defendant at law filed his bill to stay the proceedings, and obtained the common injunction. The Court held that the injunction extended to stay the proceedings for contempt in the King's Bench against the sheriff (*r*).

21. Where parties are bail for another, and the creditor brings an action, the bail cannot have an injunction to

(*n*) 2 Swanst. 548.

(*o*) *Ibid.* 549.

(*p*) *Ibid.*

(*q*) *Hawkshaw v. Parkins*, 2 Swanst.

539; see also on this subject, *Franklin v. Thomas*, 3 Mer. 225.

(*r*) — *v. Emerton*, 1 Vern. 25.

stay the action, without bringing the principal debtor before the Court (1).

22. Distraining for rent does not fall within the strict meaning of a proceeding at law, for it is the execution of the party himself, and not an action in which he applies for the assistance of a Court of law; and it may be stopped by replevying, and therefore the common injunction does not extend to a distress for rent (2).

Nor does the common injunction stay proceedings in the Ecclesiastical Court; for that purpose there must be a special application on merits (3). And it seems the same rule is applicable to stay proceedings in the Court of Admiralty (4).

23. Although, as it has been already stated, an injunction against proceedings at law cannot in general be obtained without bill, there are exceptions to that rule. Thus, the committee of a lunatic's estate may obtain an injunction on petition, to stay an action by an auctioneer against the solicitor in the lunacy, for his demand for business done for the purpose of carrying into effect the directions of the Court in the lunacy (5).

An order in the nature of an injunction has sometimes also been made, where on the ground of there being no bill before the Court, an injunction in strictness ought not to be granted. It has been indeed determined that when a decree has been made and fully carried out in a cause, the cause is out of Court, and a motion for an injunction properly so called, cannot be made in that cause, although there may be ample ground for sustaining it in a new cause (6).

(1) *Reveray v. Grayson*, 3 Swast. 145, n.

(2) *Hughes v. Ring*, 1 Jac. & W. 392.

(3) *Anon.* 1 P. Will. 301.

(4) *Ibid.*; *Reed v. Brewer*, 1 Newl. Pract. 331.

(5) *Re Weaver*, 2 My. & Cr. 441.

(6) *Ford v. Compton*, 1 Cox, 296.

But where there was a decree declaring that certain fee farm rents passed by a will, with directions to the trustees to convey them, and the decree was afterwards affirmed on appeal to the House of Lords, and the defendants afterwards distrained for those rents for the purpose of bringing the point before a Court of law; Lord King refused to grant an injunction; but his Lordship made an order to stay the proceedings at law until a bill should be filed (*a*). On the authority of this case, Lord Hardwicke, after a decree declaring the trusts of a will, refused to grant an injunction without bill to restrain proceedings in the Ecclesiastical Court touching the same will; but he made a similar order to that in *Atcherly v. Vernon* (*b*). And in a late case in Ireland, where in a suit for specific performance the only point in dispute was, whether the plaintiff could make a good title, and the Master having reported that he could not, the bill was dismissed, and afterwards the plaintiffs brought an action at law on the agreement; the Court granted an injunction, or an order in the nature of an injunction, the defendant undertaking to file a bill forthwith (*c*).

24. There are also some old cases (*d*) in which suits having abated, injunctions have been granted, although the suits were not revived. On these Lord Henley observes, that they are precedents which would not now be followed (*e*). And perhaps the same remark may be applied to the cases previously referred to (*f*). For it is not easy to see how an order to stay proceedings, differs from an injunction; or to distinguish on principle the case of a bill not having

(*a*) *Atcherly v. Vernon*, cited 2 Eq. Ca. Ab. 527.

(*b*) *Duke of Buckingham v. Duchess of Buckingham*, 2 Eq. Ca. Ab. 526.

(*c*) *M'Namara v. Arthur*, 2 Ball & Beatty, 349.

(*d*) *Duke of Hamilton v. Earl of Macclesfield*, 1 Eq. Ab. 285; *Robinson v. Lord Wharton*, *ibid*.

(*e*) *Eden on Injunctions*, 45.

(*f*) *Atcherly v. Vernon*; *Duke of Buckingham v. Duchess of Buckingham*; *M'Namara v. Arthur*.

been filed, from that of its having been filed, and being by the procedure of the Court wholly put out of Court and determined. It is submitted, therefore, to the learned reader, that a reasonable doubt may be entertained, whether the authorities cited are sufficiently consistent with principle and with themselves, to make it clear that the Court would now, without the institution of a fresh suit, grant an order to stay proceedings at law, in respect of the subject matter of a suit which has wholly determined.

25. It is sometimes made a condition of granting an injunction, where the proceedings at law are in respect of a sum of money, that the money shall be paid into Court to abide the issue of the suit. Thus, where the plaintiff in an action brought for the recovery of a sum of money is abroad, and the defendant at law obtains the common injunction for default of appearance or answer, he must pay the money into Court in a given time, usually a month, or the injunction will be dissolved (*g*).

But where a suit has been instituted to set aside a *post ablit* bond, and an injunction obtained to stay proceedings at law on the plaintiff paying into Court the sum originally lent, and interest: the money will not be paid out of Court to the defendant at that stage of the suit; the plaintiff disputing the title of the defendant to receive the money, unless the bond is set aside (*h*). And in a case in the Exchequer, where a purchaser of goods had obtained an injunction to stay an action for the price of the goods, on a bill for discovery alleging that they had been charged beyond the price agreed for; the Court would not order him to pay into Court even the price admitted to be justly due, to abide the result of the action (*i*).

(*g*) *Potts v. Buller*, 1 Cox, 330, 572.
and the cases there cited.

(*i*) *Parnell v. Nesbitt*, 2 Pri. 149.

(*h*) *Mirsack v. Farlow*, Jacob,

It seems scarcely necessary to cite an authority for the proposition, that where on a bill for account and injunction against proceedings at law, the injunction has been obtained on the terms of paying into Court the amount of the legal demand, such sum is a security and not a payment, and that therefore if it turn out that less is due to the defendant, the balance will be restored to the plaintiff (*k*).

26. Before concluding on the rules of practice in obtaining injunctions to stay judicial proceedings, it may be proper to observe, that an injunction until the hearing is always discretionary, and granted upon the circumstances of the case. There is no such thing as an injunction until the hearing, being of course; and the Court will not continue an injunction till the hearing merely on the ground that there is such a doubt, that the Court may on the hearing make some decree (*l*).

The true principle seems that the Court will or will not continue the injunction, according to the character of the doubt, viz. if the preponderance of doubt be against the probability of a decree being made against the defendant, the Court will not continue the injunction, and the contrary if the doubt preponderate in favour of the plaintiff's probability of obtaining a decree.

(*k*) *Broughton v. Pitchford*, 6 (*l*) *Potter v. Chapman*, Ambl. 98.
Mad. 295.

SECTION II.

As to Special Injunctions.

1. Special Injunctions are obtained on general writs of Habeas Corpus.
2. *Exemption, &c.* may be granted.
3. Injunction granted on request of one before Appointments, and not otherwise, is not valid.
4. In general, Parties that Subpoena should be served.
5. Exemption does not bind on Vacation.
6. (Common) Parties that (no) Appointments, special Injunctions may be granted on Notice.
7. Other Parties concerning Notice of Motion.
8. Special Injunctions may be granted unless expressly prohibited.
9. Particular Title must be shown.
10. In Writs, the Cause must be presented in threatened Waste.
11. In general special Injunctions not granted against a Person not a Party to the Suit.
12. Exemption is not valid.
13. Injunctions in Attorney General's Motion.
14. Injunction granted in Interest of an Equitable Interest, though Mortgagee, but before the Court.
15. On an order Appointments, all the Parties must be truly stated, but it is not necessary to state the whole Case.
16. Proof of an Instrument not admitted, necessary, but not of the general Title of the Plaintiff.
17. Of Affidavits in Support of Motions.
18. Where on an Injunction Parties are directed to be examined.
19. Where Parties examine on their belief of Facts within the Defendant's knowledge, and the Defendant will not deny them.
20. Where Answer of a Defendant read against co-Defendant.

1. Is general a special injunction cannot, any more than the common injunction, be obtained except on bill filed, and on motion.

2. But in regard to special injunctions there are many cases of exceptions. Thus in the case of a woman being an infant ward of Chancery, an injunction to restrain her from marrying, and to restrain the party proposing marriage from marrying her, has been granted on petition (a). So it was early determined that in a case of waste, such as

(a) *Smith v. Smith*, 3 Atk. 304.

working coal mines (*a*), or an injury in the nature of waste, such as pirating a literary work (*b*), an injunction may be granted on petition in the vacation; and such is the practice at the present day (*c*). And the reason that an injunction may be granted in vacation is, that the Court of Chancery is always open (*d*). In very pressing cases indeed, an injunction will be granted on petition and affidavits, even while the Court is sitting. Thus in the *Mayor and Commonalty of the City of London v. Bolt* (*e*), where a person had taken some old houses in the city of London, and had stowed such quantities of sugar in them, that two had actually fallen down, and he was proceeding to introduce more, the Lord Chancellor granted an injunction on petition and affidavits verifying the facts. But in that case the Lord Chancellor said, he could only grant *an injunction* on petition, and could not order any thing to be done; and refused accordingly to make an order for shoring up the houses.

An injunction has also been granted on petition without bill filed, on the application of the committee of a lunatic, to restrain waste by the tenants of the lunatic's estate (*f*).

3. In waste, and cases of injury in the nature of waste, such as working mines, piratically printing books, ploughing up ancient meadows, or negotiating a bill or promissory note fraudulently obtained, the Court will, on a sufficient case made, issue an injunction on certificate of bill filed and affidavit of merits, before appearance without notice (*g*), and even before subpœna served (*h*). And the same principle it is said prevails where the plaintiff having obtained the common injunction to stay proceedings on

(*a*) *Smith v. Clarke*, Dick. 455.

(*b*) *Nichols v. Kearsley*, Dick. 645.

(*c*) 1 *Smith's Prac.* 595.

(*d*) *Temple v. Bank of England*, 6 Ves. 769; 7 Ves. 257.

(*e*) 5 Ves. 129.

(*f*) *Re Creagh*, 1 Ball & B. 108.

(*g*) See *Doolittle v. Walton*, Dick. 442; 1 *Smith's Pract.* 593; Newl. Pract. 337.

(*h*) 1 *Smith's Pract.* 593; 1 Newl. Pract. 337.

such an instrument, moves on affidavit to extend the injunction to stay trial (c).

So as to a bill given for a gambling debt, an *ex parte* injunction has been granted to restrain the negotiation of it, although it was void in its very nature (d), on the ground that it would interfere with the necessity of making other persons parties (e).

4. In general, however, to sustain a special injunction, subpoena to appear and answer must have been served on the defendant. This was indirectly decided in opposition to the antecedent practice in a case of *Attorney-General v. Nichol* (a), and the practice appears since to have been accordingly (b).

5. There is an exception, however, where the bill is filed in the vacation, and then if the application for an injunction is immediately made, it may be obtained without service of subpoena; but if the motion stand over, so that there is time to serve the subpoena, it cannot be renewed until subpoena has been served (c).

Here it may be observed, that it is irregular to serve a subpoena on a Sunday. And where that has been done, and an injunction and attachment grounded on it have been issued, the defendant may, although he has not appeared,

(c) 3 Br. C. C. 476, s. 4.

(d) By stat. 9 Ann. c. 14, s. 1. Such cases are now held to have been given for an illegal consideration; see *ante*, p. 6.

(e) *Depey v. Gordon*, 2 Swab. 140.

(a) 16 Ves. 331. In the case an injunction had been obtained on presentation of bill filed, and Lord Eldon refused, it is true, to dissolve the injunction, although subpoena had not been served, on the ground that the plaintiff had been misled as to the practice, and that in fact the practice had been both ways. But the Lord-

ship thought, that the injunction ought to have been served, and in effect decided so, by depriving the plaintiff, in respect of their having neglected to serve subpoena, of the right to require the defendant to answer before moving to dissolve a right which, under the form of injunction then in use, viz. "until the defendant should appear and fall answer make," the plaintiff would have had, if they had themselves proceeded regularly.

(b) Newland's Pract. 386.

(c) *Day and Martin v. Goring*, 1 Hog. 211.

come to discharge the orders for irregularity, on entering an appearance with the registrar, and the injunction and attachment will be set aside (*p*).

It is proper also to notice, that where by an act of parliament incorporating a company, the *service* of any writ or notice on a director, is made good service on the company, a notice of motion must nevertheless be *addressed* to the company, the act only affecting *service* of the notice (*q*).

6. The general rule is, that although an appearance gratis does not defeat the plaintiff's right to an *ex parte* injunction, yet, *after* the defendant has appeared on subpoena served, a special injunction can be moved for only upon notice (*r*); but an exception to that rule is made where the threatened danger is imminent and would be irremediable (*s*), and that whether the defendants have been served with notice, or have appeared gratis. In *Acraman v. Bristol Dock Company* the defendants had appeared gratis on the filing of the bill, and it did not appear, nor was it stated, that they had been actually served with subpoenas at the time the motion was made. It was contended that the motion was in fact an *ex parte* one, and that the defendants were not entitled to be heard by counsel, but this objection was overruled.

The ground for permitting an injunction without notice of motion, where the danger is imminent, whether the defendant has appeared or not, is, that if a person about to commit waste could, by appearing the evening before the motion, prevent it, he would get two days for committing the waste (*t*); but perhaps it might have been different if he had appeared long enough to enable the plaintiff to give notice (*u*).

(*p*) *Mackreth v. Nicholson*, 19 Ves. 367.

(*q*) *Brickwood v. Harvey*, 8 Sim. 201.

(*r*) *Marasco v. Boitou*, 2 Ves. sen. 112; *Collard v. Cooper*, 6 Mad. 190; *Perry v. Weller*, 3 Russ. 519, and see *Harrison v. Cockerell*, 3 Mer. 1.

(*s*) *Allard v. Jones*, 15 Ves. 605; *Acraman v. Bristol Dock Company*, 1 Russ. & Myl. 321; *Petley v. Eastern Counties Railway*, 8 Sim. 483; *Bell v. Hull and Selby Railway Company*, 1 Rail. Cas. 623.

(*t*) *Allard v. Jones*, 15 Ves. 605.

(*u*) *Ibid.*

7. And where there is no immediate apprehension of mischief, notice must be given if the defendant has appeared (c). And when the motion is made after appearance, the affidavit in support of it should state that fact. If it does not, the order will be irregular (a).

A notice of motion served by special leave of the Court, for a special injunction before the defendant's appearance, to be moved on a day not appointed for motions, must state on the face of it that the leave of the Court has been obtained. If it does not, the defendant may disregard it (y).

8. As regards special as well as other injunctions, it must be observed, that an injunction, properly so called, cannot be granted, unless expressly prayed for by the bill (z).

9. To obtain an *ex parte* injunction against waste, a particular title must be shewn; an affidavit generally that the plaintiff is entitled in fee simple is not enough (a); nor that he is informed and believes that he is a remainderman under a settlement (b). And the same rule applies to cases of copyright (c).

10. In cases of waste, the injunction must be either for present or threatened waste. It will not be granted on an allegation that A. has not accounted to B. as he ought to

(c) *Colard v. Cooper*, 6 Mod. 190.

(x) *Harrison v. Cochrin*, 3 Mer. 1; *Rinfell v. Commercial Railway Company*, 8 Law Journ. 252.

(y) *Hill v. Russell*, 8 Sim. 632.

(z) *Stacey v. Dyer*, Amb. 70.

(a) *Whitelegg v. Whitelegg*, 1 Br. C. C. 57. The bill in this case alleged, that one of the defendants was the plaintiff's tenant; and that the other, who was the plaintiff's younger brother, pretending some title, had induced the tenant to attorn to him; and that

the two had committed waste. The motion was renewed on an affidavit, setting out particularly the transactions and deeds under which the plaintiff claimed, and on that an order for an injunction was made. See the note in 1 Br. C. C. 57, and Reg. L. b. B. 1770, fol. 865.

(b) *Davis v. Lee*, 6 Ves. 784.

(c) *Platt v. Butler*, 19 Ves. 447; *Gilbert v. Stagg*, 2 Eq. Ab. 322; *Morris v. Kelig*, 1 Jac. & W. 481.

have done for the rents he has received, nor the wood he has cut down(*d*); nor on a mere apprehension that the defendant means to commit waste, when he denies such intention(*e*). It is sufficient however to support an application for an injunction to stay cutting timber, that a surveyor has been sent to mark out trees. The Court will not wait till they are actually cut down(*f*). So a threat of opening mines(*g*), or cutting timber(*h*) is sufficient.

But a threat, or such conduct on the part of the defendant as will induce a belief in a strong probability that he will do a wrongful act, is not sufficient to ground an injunction, if the wrong is not only one that has not actually happened, but cannot possibly happen until a *certain* future period. Thus in a partnership, containing a covenant that either party might dissolve at the end of seven years, and that after dissolution the party retiring should not carry on business within a given distance; a notice of dissolution, and of intention to carry on business after it, was held insufficient to support a motion for an injunction to restrain the defendant from soliciting business, and from dissuading parties from employing the plaintiff, as the relief asked was not against an existing wrong, but against the possibility of a future wrong(*i*). And although if the covenant had been sufficiently wide, soliciting persons for business before the period of actual dissolution, might have been sufficient to ground an injunction, yet as the covenant was only against *actually practising* the business, it was held that the *soliciting* would not at law be within the covenant, and therefore was no ground for relief in equity (*k*).

11. It has been observed, in reference to injunctions to stay proceedings at law, that they cannot in general be ob-

(*d*) *Anon.* Lofft, 151.

(*e*) 7 Ves. 309.

(*f*) *Jackson v. Cater*, 5 Ves. 688.

(*g*) *Gibson v. Smith*, 2 Atk. 182.

(*h*) 7 Ves. 310.

(*i*) *Coates v. Coates*, 6 Mad. 287.

(*k*) *Ibid.*

tained against a person not a party to the suit; and that is also the general rule as regards injunctions obtained on special application.

12. But there are exceptions to it. Thus, where a person purchases under a decree, although not a party, he submits himself to the jurisdiction of the Court in all matters connected with his character of purchaser. If therefore he disobeys an order to pay in his purchase-money or to give up possession, he will be restrained until he delivers up possession, from committing waste (*l*).

So an injunction will under circumstances be granted to restrain a *volunteer*, not a party, from acting for one of the parties (*m*). And it seems from a short note of a case in Dickens (*n*), that an injunction might be granted to restrain waste by persons not parties, as for instance a tenant in possession, or tenants of a house.

And by the 40 Geo. 3, c. 36, an injunction may be obtained against the Bank of England, to restrain them from permitting the transfer of stock, although they shall not be parties to the cause. Before the passing of this act, an injunction against the Bank to restrain the improper transfer of stock, would not be granted except on notice, nor till after the other defendants had appeared, or were in contempt (*o*). And the same rule still it seems exists; and in order to obtain an injunction against the Bank when they are not made parties, notice must be given to the defendants, unless from the necessity and urgency of the case notice cannot be given. And then the application must be on affidavit that such necessity and urgency exist (*p*).

13. A special injunction being always granted on

(*l*) *Compton v. Strad*, 1 Sim. & Sta. 321.

(*m*) *Chalmers v. Chase*, 19 Ves. 261.

(*n*) *Attorney-General v. Duke of*

Leinster, Dick. 38, and a case cited in *Magg v. Magg*, Dick. 670.

(*o*) *Dunlop v. Wooten*, Dick. 442.

(*p*) *Hawes v. Mansfield*, 6 Ves.

673, *infra*.

merits, can of course, in general, only be dissolved on the merits appearing either by the answer or by affidavits; and as the injunction is granted till answer *or* further order, the settled practice is now for the defendant to move to dissolve at his option, either on the answer, or before answer on affidavits(*q*), without reference to any question whether the plaintiff has, by neglecting to serve subpœna, waived his right to an answer.

In the *Attorney-General v. Nicoll*(*r*), it was contended, that the defendant could not be heard to dissolve an injunction on the merits on affidavit, or until answer; and the Lord Chancellor held that the relators, *not having served subpœna*, should be considered to have *waived their right* to an answer, and that *where no subpœna has been served*, the defendant may come to dissolve on the merits disclosed by affidavits. This reason requires some explanation, as it might be inferred that Lord Eldon meant to say, that where subpœna has been served, the defendants cannot come to dissolve the injunction on affidavits, a position which would be at variance with modern practice. But this apparent discrepancy between the practice of the present day and the reasoning of Lord Eldon in the *Attorney-General v. Nicoll*, is removed by observing, that at the time when that case was heard, it seems the form of the special injunction was usually “till answer *and* further order,” and was in that case, as appears by the Report in Vesey(*s*), “till answer.” The present form, which was not adopted till some years afterwards, is, “till answer *or* further order.”

It required, therefore, consistently with the form of the order in the *Attorney-General v. Nicoll*, some special ground to allow the defendant to dissolve before answer, whereas the present form of order has, it is said, been adopted for the express purpose of allowing the defendant

(*q*) 1 Newland's Pract. 353, and the case of *Taylor v. Waistall*, there cited; see also Smith's Pract. 600.

(*r*) 16 Yes. 338.

(*s*) 16 Ves. 339.

to move before answer, and at all events his doing so is perfectly consistent with the terms of the injunction (d).

14. In *Canard v. Chadwick* (f), a motion by an equitable mortgagee for a receiver was refused, the mortgagor not having appeared. But in a later case an injunction and receiver were granted at the suit of an equitable mortgagee, against the trustees of the head estate and a prior mortgagee, although the mortgagor was out of the jurisdiction, and had not appeared (g). The Court put it on the ground that if the residence of the mortgagor out of the jurisdiction were to have the effect of precluding such an order, a second mortgagee might be delayed to all eternity. However, the order will be so framed as not to prevent any who may have a better title to the possession, from ousting such equitable mortgagee (h).

Where a person has granted several successive annuities, and a bill is filed by one of the mortgagees, making all but the first parties, and in that suit a decree is made ascertaining the priorities of the mortgages, appointing a receiver, and giving consequential directions; it is irregular in the first mortgagee to file another bill, and move in such second suit for an injunction to restrain the receiver from receiving the rent. He ought to apply in the first suit for leave to enforce his legal remedies (y).

15. It is the duty of a person coming for an *ex parte* injunction not to misrepresent the facts of the case, and to state all the material facts to the Court (z). But if he states on applying for an *ex parte* injunction the facts as they were shortly before filing his bill, the injunction is not irregularly obtained, although it should turn out to be the fact that the day before the bill was filed, the defendants had

(d) See on this *Iden on Injunc.*
325, 326, and note (g), p. 325.

(e) 2 Russ. 159, n.

(f) *Tanfield v. Irvine*, 2 Russ.
142.

(g) 2 Russ. 151.

(h) *Smith v. Earl of Effingham*, 2
Beav. 232.

(i) 1 Myl. & Cr. 210, 211.

commenced abating the injury complained of, provided the plaintiff was not aware of that fact at the time of applying to the Court (*a*). And he is not, it seems, bound to lay the whole law before the Court; and therefore an *ex parte* injunction was held not irregularly granted, because the plaintiff, calling the attention of the Court to an act of parliament generally, had not particularly called its attention to certain clauses of the act, which might have produced a different impression on the mind of the Court (*b*).

16. Where an *instrument* is neither admitted nor denied by the answer, in order to obtain an injunction, the plaintiff must, it seems, prove the existence of it by affidavit. But the practice is otherwise as to the *personal right* of the plaintiff. Thus, where the plaintiff was in possession, claiming as tenant in tail under a settlement, the Court thought that he need not prove the marriage of his father and mother, the answer neither admitting nor denying it; his possession being sufficient evidence of his alleged title for the purpose of the injunction, where it was neither admitted nor denied by the answer (*c*).

17. Considerable difficulty has always been experienced in clearly ascertaining the practice as to when affidavits may, and when they may not be read in support of an injunction, against the defendant's answer. The general rule is undoubtedly, that for the purpose of obtaining or continuing an injunction, affidavits cannot be read against the answer (*d*), but there are exceptions to this rule (*e*). And in cases of waste or of injuries in the nature of waste, affidavits are allowed to be read, under certain circumstances, against the answer, as to the acts of waste, though not as to title (*f*).

(*a*) *Semple v. London and Birmingham Railway Company*, 1 Rail. Cas. 480.

(*b*) *Attorney-General v. Mayor of Liverpool*, 1 Myl. & Cr. 171.

(*c*) *Hodgson v. Dean*, 2 Sim. &

Stu. 221.

(*d*) See Newl. Pract. 341; 1 Smith's Pract. 596.

(*e*) *Ibid*.

(*f*) See *post*, chap. v., where the subject will be more fully discussed.

In a very late case before the Vice-Chancellor, the plaintiff having applied for an injunction *ex parte* to prevent the defendant from interfering to arrears of an annuity, the Court ordered the plaintiff to give notice of motion. The answer was put in after the notice had been served, but before the day named in it for the motion to be made; and on the motion being made, the defendant objected that the affidavits filed in support of the bill could not be read in opposition to the answer; but his Honor overruled the objection, and allowed the affidavits to be read (g). And to the same effect is a late case in Ireland, where the Court held, that if the answer to a bill for a special injunction is put in after the notice of motion has been served, it can only be used as an affidavit in opposition to those of the plaintiff, and not to turn the plaintiff round, and prevent him from obtaining the injunction except on the equity confessed in the answer (h).

18. Where in an application for an injunction upon affidavits met by affidavits, such affidavits are contradictory as to the material facts, the Court will direct an issue, ordering both parties to be examined. It is not, however, to be understood that the parties are to be witnesses for themselves, or for the other side, but they are witnesses for the Court (i).

19. It has been held in the Exchequer, that if in support of an application for an injunction to restrain the transfer of stock into the names of a *feme covert* administratrix and her husband, on the ground of insolvency and of their being abroad, the plaintiff will swear to his belief of insolvency, and the defendants by their affidavits do not clearly negative that allegation, an injunction ought to be granted; for that where a party swears to his belief of a circumstance which must, if true, be in the knowledge of the person whom the statement is meant to affect, and he

(g) *Antoine v. Keble*, 7 Sim. 133.

(h) *Atkinson v. Gifford*, Hag. 110.

(i) *De Tonet v. Bordenage*, Jac. 516.

will not deny it, such belief is sufficient to induce the Court to take the circumstances as acknowledged (*k*).

In general the answer of one defendant cannot be read for the purpose of affording evidence against another; but in an early case, where the answer of one defendant referred to the answer of a co-defendant, the answer of the latter was allowed to be read against the former (*l*).

(*k*) *Scott v. Becker*, 4 Pr. 346.

(*l*) *Anon.* 1 P. Will. 301.

CHAPTER II.

Enjoining the Common Injunction to Stay Trial

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| 1. <i>Provision of staying the Common Injunction to such Trial.</i> | 1. <i>Order is entered, and must stand in the Term in. or Return.</i> |
| 2. <i>Order not obtained without Affidavit that the Plaintiff is expected to be present.</i> | 2. <i>Commons must be in the Return; they have no stay by the Exception.</i> |
| 3. <i>Order cannot be procured till.</i> | 3. <i>Defendant Joseph Addy, a good Ground for resisting Motion is stated.</i> |
| 4. <i>Thompson v. Hughes equivalent with the Rule.</i> | 4. <i>As to extending Injunction to Orders of Committal to various Warrants.</i> |
| 5. <i>Duration of extending the Common Injunction, as laid down by Lord Esher.</i> | 5. <i>Order is not Motion to settle is entered on amended Bill.</i> |
| 6. <i>Case where the Common Injunction must not be given obtained.</i> | |

1. IF the common injunction is obtained before the declaration in the action at law is delivered, it stays all proceedings; but if it is not obtained till after the declaration has been delivered, it only stays execution, and not trial (*a*).

But it happens frequently that the object of applying to the Court of Chancery is not that the plaintiff in equity, admitting himself unable to make a good defence at law, can show that he has an equity against the plaintiff at law, requiring the interference of equity to deprive the plaintiff at law of the fruits of his legal rights; but that there is matter in the knowledge of the plaintiff at law only, or in the breasts of witnesses whom the plaintiff in equity cannot bring forward at the trial, which would give him a good

(*a*) 10 Ves. 452. see also *Paton v. Owen*, 16 Ves. 141. and see 40

Ves. 469. In the Exchequer it is otherwise. Fowl. Pract. 218, et seq.

defence at law; and the relief then asked of equity is, to extend the common injunction to stay *trial*, until the plaintiff at law shall have put in his answer, or if the testimony necessary be that of witnesses, and a commission to examine them has been obtained, then till the return of the commission.

2. Accordingly the plaintiff, in asking for an order to extend the common injunction on the ground of the defendant not having put in his answer, must show a case which will satisfy the Court that the answer is material to his defence at law. This is done by supporting the application by an affidavit. Formerly the affidavit was allowed to be in very loose terms, merely swearing that the plaintiff was advised and believed that he could not safely proceed to trial without the answer (*b*); and Lord Eldon made an order on such an affidavit in *Partington v. Hobson* (*c*). But in a case of *Appleyard v. Seton* (*d*), which occurred only a few days later, his Lordship disapproved of his former order, and required the affidavit to go further; and the practice is since that case settled, that the affidavit on an application to extend the common injunction to stay trial, must state that the plaintiff believes the answer will *furnish discovery material to his defence* at law. It is not sufficient to state that he cannot safely go to trial without the answer; for, as Lord Eldon observed in *Appleyard v. Seton*, it may be true that he cannot safely go to trial, with or without the answer (*e*). Generally the affidavit must be made by the plaintiff himself; an affidavit made by the plaintiff's solicitor will not be sufficient, without good cause shown why it was not made by the plaintiff (*f*).

(*b*) See *Hartly v. Hobson*, 2 Dick. 728; *Farrar v. Lewis*, *ibid.* 729; *Nelthorpe v. Law*, 13 Ves. 323; and see 10 Ves. 452, *notis*.

(*c*) 16 Ves. 219.

(*d*) 16 Ves. 223.

(*e*) See the usual form of affidavit, 2 Smith's Praet. 526.

(*f*) *Spalding v. Keely*, 7 Sim. 377.

3. In a late case, the allegation of the affidavit was that the plaintiff believed the answer would furnish matter for his defence, or *find material to reduce the amount of damages sought to be recovered*; and on that affidavit Lord Langdale, M. R., made an order to extend the common injunction, &c. So in a case before his Honor the Vice-Chancellor, an order was made on an affidavit that the defendant believed the answer would contain matter which, *together with other evidence*, would be material for his defence at law (*h*).

4. The affidavit of the plaintiff in support of a motion to extend, may be filed only the day before the motion, as it is one that generally cannot be answered (*i*), for the Court gives credit to it and never examines how far it is correct (*j*), except to this extent, that if the defendant alleges that the plaintiff has by his bill stated a case which, admitting the whole to be true, would not introduce evidence or a discovery that could possibly be material at the trial, the injunction, as it could be of no use to the plaintiff, would not be granted under such circumstances, but the Court will trust the affidavit of the plaintiff, unless the bill on the face of it shows that the discovery will be immaterial (*k*). Here must be noticed a late case (*l*), which appears at first sight to militate against the doctrine of *White v. Steinbachs*. In the case referred to, a company authorised under an act of parliament to sue and be sued by its officer, brought an action in the name of one Hughes, the secretary, against a shareholder for instalments; the defendant at law filed his bill against Hughes and nine other persons, as directors and shareholders, charging a case of fraud, and obtained the common injunction for default of appearance against

(g) *Parker v. Day*, 1 Petv. 374.

(h) MS. sitting after Trinity Term 1840. This case, indeed, gave the ground for the affidavit, see 2 Smith's Plead. 526.

(i) *Jones v. —*, 8 Ves. 46.

(j) 10 Ves. 489.

(k) *White v. Steinbachs*, 19 Ves. 83.

(l) *Thorne v. Hughes*, 3 My. & Cr. 742.

the defendants (other than the secretary Hughes). Hughes was not in default, and there was no injunction as against him. The plaintiff afterwards obtained an order to extend the injunction to stay trial of the action alleged to be commenced by the nine persons, made defendants in the name of Hughes. On a motion before the Lord Chancellor to discharge this order, his Lordship said, referring to the case of *Lord Portarlington v. Graham* (m), that if this was a special injunction, it was wholly contrary to practice, and that the rule of the Court was universal, that proceedings at law cannot be restrained except on the defendant's default; and unless the Court treated it as a special injunction by looking at the affidavits, the Court could know nothing as to the connexion between Hughes and the other defendants. The action was brought by the company in the name of Hughes, and not by the other defendants, and this order, under the form of an order against the other defendants, which would be useless, because no action had been brought by them, was in fact a special injunction against a party not in default. On this ground alone his Lordship held the order contrary to the practice, and bad. It appeared also, that having regard to the issues tendered at law, the matters sought to be discovered by the bill were quite collateral to those issues, and on this ground also the Court thought that the order could not have been sustained. "Although," said his Lordship, "the Court gives credit to the plaintiff's affidavit, yet if it does appear on the whole matter taken together, that the ordinary allegation that the matters sought to be discovered by the bill would be a material defence to the action, cannot possibly be true in fact, it is a ground on which the Court will refuse to extend the injunction to stay trial (n)." Now in the case last mentioned, it did not appear on the face of the bill itself that the issues were such that the discovery could not be material. That case appeared only by the affidavit of the defendant, and therefore the Court did discredit the affi-

(m) 5 Sim. 416.

(n) 3 My. & Cr. 761.

davit of the plaintiff by reference to matters *dehors* the bill. The distinction however between this case and *White v. Steinmeyer* is, that in the latter case there was nothing before the Court in any step antecedent to the motion but the bill, and the very point was, whether, for the purpose of discharging an order to extend the common injunction, an affidavit should be heard. Whereas in *Thorpe v. Hughes*, the defendant's affidavit in an antecedent stage of the proceedings was before the Court on the face of the very order which the plaintiff had obtained, as in part the ground of that order. The case of *Thorpe v. Hughes* does not therefore seem to establish any principle inconsistent with the general doctrine; and goes no further on the point under consideration than to lay down that, when the matter of the defendant's affidavit is incorporated in the very order, on the validity of which the Court has to decide, the Court will not reject such matter, but will look at it and decide upon it in conjunction with the matter of the bill, whether *on the whole* the discovery sought can be a material defence (*o*).

The Court will not dispense with proof that the discovery sought by the plaintiff in equity, is material to his defence at law. Thus in a case where the common injunction for want of answer had been obtained, a motion was made to stay execution of a writ of inquiry of damages, and all further proceedings until answer, on an affidavit that the rights of the defendant were disputed by other parties co-defendants to the bill, and could only be determined by a Court of equity, and that the damages could not be assessed without an account of the estate of the plaintiff's testator; the Court said it was in effect a motion to extend the common injunction to stay trial, without the usual affidavit as to the materiality of the discovery, and refused it with costs (*p*).

(o) See also the note of the learned reporter in *Thorpe v. Hughes*, 3 My. & Cr. 761.

(p) *Redenbach v. Tisdall*, Turner & Russ, 305.

5. The general doctrine as to extending the common injunction to stay trial, is laid down at considerable length and with great clearness by Lord Eldon in *Bishton v. Birch* (r). "The course of the Court," his Lordship said, "he took to be this, that if the defendant to a bill for an injunction to stay proceedings at law, being served with a subpœna, does not appear, or craves time, the plaintiff moves for an injunction, which does not stay the proceedings at law, if they had commenced before the suit in equity, as far as regards the trial, but only stays execution. That injunction must be first obtained before the plaintiff can apply to extend the injunction to stay trial, for which purpose it is not sufficient to state that the defendant has not appeared or answered, but the plaintiff must make an affidavit that the discovery he expects from the answer will assist him at law, and upon that the injunction is extended to stay trial."

6. An exception, however, to the rule, that the common injunction must be first obtained, is to be observed in regard to charities. In the *Attorney-General v. Pearson* (s), which was a case turning upon the trusts of a charity, an injunction was asked, among other things, to stay all proceedings at law by the defendants to recover possession of the meeting-house; to this it was objected, that an injunction to stay proceedings at law could only be granted in the first instance to stay execution and not to stay trial, but the Lord Chancellor said, that in cases of charitable trusts for religious purposes, the Court would not be troubled with any question of practice as to whether it was a common or special injunction, but is in the constant habit of saying, that, provided it sees any way of deciding the points at issue, it will not allow the parties to go to trial, but will itself find the means of putting the matter into a course which may save all the expense of such a proceeding.

(r) 2 Ves. & Bea. 40.

(s) 3 Mer. 353.

And there is also no exception in regard to interpleading suits. In these the plaintiff should not obtain the common injunction and then move to extend it to stay the trial, but should move at once for an injunction to stay further proceedings, for the injunction granted on a bill of interpleader stays proceedings at law *ill further order*, and not like the common injunction, *ill answer and further order* (1). It does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea and proceed to judgment, but stays all proceedings (2). There was indeed, it seems, formerly an opinion that on an interpleading bill the injunction cannot be moved for till the time for answering is out; but the case of *Warrington v. Whistlons* has decided that that opinion is unfounded (3).

7. An order to extend the common injunction to stay trial will not be made close to the time of the answer (as for instance, where the common day at Lancaster was the day before that on which the motion was made); unless the plaintiff will give security for costs (4).

Nor can an injunction to stay trial be obtained at once, although the plaintiff is in a condition to obtain the common injunction. Nor can the plaintiff move for the common injunction, and then at the same seal move to extend it to stay trial (5). The course is, that the plaintiff first obtains the common injunction; and as soon as he has perfected the order, he may serve a notice of motion on the defendant's clerk in Court, to extend the common injunc-

(1) *Moss v. Coker*, 7 Sim. 539; and see also *Fuery v. Hilder*, 1 Sim. 15, 20; and *De ren*, 228. In the report of *Moss v. Coker*, an error has crept in, the notice of the learned reporter. The expressions substituted for *Honor* are, that the "common injunction stays proceedings at law *ill answer and further order*." This must

be a misprint, for the common injunction is *ill answer and further order*. (4) *De ren*, 228.

(5) *Warrington v. Whistlons*, 12 C. 272.

(1) *Ellis v. Whistlons*, 13 Ves. 454.

(2) *Gordon v. Pearson*, 10 Ves. 430.

tion to stay trial (*a*). The motion is supported by an affidavit to the effect already pointed out (*b*).

On this point the practice is thus stated in *Taylor v. Leigh* (*c*), that an injunction to stay trial cannot be moved for till the common injunction has been obtained ; and the reason is, if the defendant puts in his answer it may not be wanted ; but the moment the common injunction is obtained, the plaintiff may go on to extend it upon the usual affidavit, unless there has been great delay, or the application is made a day or two before trial ; and it is no ground for refusing the order to extend, that upon comparison of the date of the assizes at which the action is to be tried, with the date at which, according to the rules of the Court, the defendants must put in their answer, it would appear that the answer must be in before the trial ; for there are no means of knowing when the plaintiff will get in a full answer. The rule of the Court is, that an application in a certain form is all that is required, and the Court will not hear the particular circumstances of the case (*d*).

An order to extend will not be granted when the plaintiff has been guilty of delay unaccounted for. Thus where an action had been pending for two years, and a new trial was to take place at York on the 7th of March, and the plaintiff in equity did not file his bill till the 9th of February, and having obtained the common injunction, moved to extend it on the 28th of February ; and the only ground for not filing the bill sooner was, that the plaintiff was not aware of the importance of certain deeds in the possession of the defendant, though perfectly aware of their being in his possession, the Court refused a motion to extend the common injunction with costs (*e*).

8. Generally the order to extend cannot be moved for, except on notice to the defendant ; but there may be ex-

(*a*) See 1 Smith's Pract. 612.

(*b*) *Ante*, 377, 378.

(*c*) 2 Jac. & W. 388.

(*d*) *Ibid*.

(*e*) *Field v. Beaumont*, 3 Mad. 132 ;
and 1 Swanst. 204.

ceptions to this rule. Thus in a late case before Sir L. Shadwell, V. C., a plaintiff at law not having appeared to a bill for an injunction, and being in contempt, the common injunction having been obtained, a motion was made to stay trial without notice, there being in fact no person on whom to serve notice. His Honor made the order, saying he had shortly before made a similar one (*f*).

9. It is a good objection to a motion for an order to extend the common injunction to stay trial, that the answer is filed (*g*); and if the defendant files his answer between the time of serving the notice and the time for making the motion, it cannot be made (*h*); but for that purpose, it must have been filed at the latest by eight o'clock on the evening before the seal day. And where an answer was filed on the seal day, and notice of motion to extend the common injunction to stay trial had been given for that day, but owing to the pressure of business on the Court, the motion was not heard till the next day, it was held by Sir J. Leach that the answer was too late to prevent the order (*i*). And so where the answer was sworn on the day before the seal, but owing to the misinformation of the solicitor, who did not know that it was a half holiday, and that the Six Clerks' Office was not open in the evening, the answer was not actually filed till early on the morning of the seal day;—on a motion being made to have an order for the common injunction and attachment for want of answer discharged, and that the answer might be considered as filed on the day preceeding the seal, the Court refused the motion with costs (*h*). The principle of the Court seems to be, according to *Bruce v. Webb* (*l*), that as the order for an injunction, or to extend an injunction, or for an at-

(*f*) *Harrison v. Ditch*, MS. V. C. 16 July, 1840, S. C. 9 Law Journ. N. S. 365.

(*g*) *Bolton v. Ditch*, 1 Ves. & Bea. 266.

(*h*) *Ibid.*

(*i*) *Whitburn v. Hickman*, 1 Sm. & Stu. 102, and see *Thompson v. Byrne*, 2 Beav. 15.

(*k*) *Harrison v. Ditch*, 1 Sm. & Stu. 103.

(*l*) 2 Mer. 474.

tachment, is to be considered as made at the very earliest moment of the seal day, the answer, in order to be used as an objection against issuing these orders, must be filed on the preceding day. But an insufficient answer will not be ground for resisting a motion to extend. And in a case where, before the motion was decided, exceptions were taken to the answer, and then a further answer was put in, a motion to extend was granted, because the defendant, by submitting to answer further, admitted that the original answer was insufficient, which is the same as if there was no answer (*m*).

In a case where a motion was made to extend the common injunction to stay a trial coming on the next day but one, and the answer was filed the same morning that the motion was made, Sir J. Leach, V. C., refused to make the order unless the answer was insufficient, on the ground that the motion was made too late ; but his Honor having read the answer, and being of opinion that it was insufficient made the order (*n*); and the bill and motion must make the same case : thus where the bill stated that the plaintiff at law had proceeded to judgment, and sought to restrain execution, a motion to extend the common injunction to stay trial was refused (*o*).

10. As to extending the common injunction to stay trial where it is necessary to have a commission to examine witnesses, the rule of the Court is that when the time for answering has expired, the plaintiff may have a commission to examine witnesses in aid of his defence to an action before answer (*p*). The object of granting the commission is to collect evidence for the trial ; the consequence of which is that *primâ facie* the trial must not take place till the return of the commission. On these grounds, where a commis-

(*m*) *Bishton v. Birch*, 1 Ves. & Bea. 366.

(*n*) *Munnings v. Adamson*, 1 Sim. 510.

(*o*) *Thompson v. Byrom*, 2 Bea. 15.

(*p*) *Noble v. Garland*, 1 Ves. 377.

sion had been granted to examine witnesses abroad, the answer not being put in, an order extending the common injunction to stay trial till return of the commission or further order was held regular (*q*). But a commission cannot be obtained before the defendant has neglected to put in his answer within the time allowed by the practice of the Court (*r*).

Mr. Daniell suggests that since the orders of 1833, the Court, instead of waiting till the defendant is in contempt, which since those orders is a much longer period than before, would probably make an order for a commission to examine witnesses, upon the plaintiff obtaining the common injunction to stay proceedings at law, which, under those orders, he may now have, if the defendant does not put in his answer within eight days after appearance (*s*).

11. It is to be observed, that the motion to extend is grounded on the common injunction; so that where a plaintiff has no case to stay trial on the bill, he cannot have the order to extend. Thus where a plaintiff in equity obtained the common injunction, the answer being insufficient, and on the same day moved for leave to amend his bill, and that the defendant should answer the amendments and the exceptions at the same time, and afterwards moved to extend the injunction to stay trial, Lord Cottenham, then Master of the Rolls, held that the injunction to stay trial grows out of the common injunction; and as the plaintiff by amending, admitted that he had not a case to stay trial on the bill as it originally stood, he could not by amending place himself in a better situation; and the motion was refused with costs (*t*). The case of *Brown v. Reina* (*u*) was relied upon, and the Court alluded to it as an authority in

(*q*) *Doubler v. Hodge*, 2 Swast. 256.

(*r*) 2 Dan. Prer. 582.

(*s*) *Chambers v. De la Cour*, 1 Mad. 296.

(*t*) *Miles v. Creanell*, 2 Myl. & K. 616.

(*u*) 1 You. & Jer. 369.

point. In a late case (*x*) where the same point occurred, a case of *Martin v. Mortlock*, before Lord Eldon (*y*), was cited, in which it was decided that after reference of the answer for insufficiency, order to amend, and for defendant to answer amendments and exceptions at the same time, an order to extend might be obtained. And on the authority of this case the Vice-Chancellor held that the order to extend, in the case before him, had been regularly granted.

It must not, however, be overlooked, that the reasoning on which *Mellor v. Cresswell* was decided, is not displaced by either of the other cases; and that although his Honor the Master of the Rolls alluded to *Brown v. Reina*, as an authority in point, his decision appears by the report to have been grounded mainly on the reasoning. And in a later case (*z*) Lord Cottenham, C., is understood to have adhered to the doctrine which he laid down in *Mellor v. Cresswell*.

(*x*) *Simes v. Duff*, 8 Sim. 270.

B. fol. 1584.

(*y*) 1 Newl. Pract. 356; Reg. Lib.

(*z*) *Howard v. Cliffe*, 3 Jur. 817.

CHAPTER III

*Of the Effect on Injunctions of Amendments; and of
reviving an Injunction.*

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| 1. <i>Effect of Amendment on the Common Injunction, before the Orders of May, 1839.</i> | 9. <i>Lee v. Ravencroft, and Brown v. Newall, and Effect of Third Order of May, 1839, in Cases of this Nature.</i> |
| 2. <i>Alteration effected by the Second Order of May, 1839.</i> | 10. <i>Where Injunction not perjured by the Plaintiff.</i> |
| 3. <i>Positive formality that Amendment did not preclude a Special Injunction.</i> | 11. <i>Where Exceptions allowed: Defendant puts in Twelve Answer before or after Order is made.</i> |
| 4. <i>Former Practice as to amending, when Injunction had been granted, or granted on Motion.</i> | 12. <i>Effect of Amendment on a Notice of Motion.</i> |
| 5. <i>Third Order of May, 1839.</i> | 13. <i>Where Injunction not revived.</i> |
| 6. <i>Objections to Davis v. Davis, and Pratt v. Archer.</i> | 14. <i>Where Answer refers to Amendment, the Court is to resist the Dissolution of the Injunction, not to let it be dissolved, and then move to revive.</i> |
| 7. <i>Effect of Second Order of May, 1839, on the Practice as to amending after Exceptions.</i> | |
| 8. <i>Of Re-Amendments.</i> | |

1. **WHEN** the common injunction has been obtained for default of answer, it frequently happens that on the coming in of the answer, matter is disclosed by it which makes it necessary to alter the bill by amendment. Formerly the effect of amending the bill after having obtained the common injunction was to displace the injunction, unless it was sustained by the terms of the order, expressing that it was to be without prejudice to the injunction (a); and if

(a) *Bloss v. Buchanan*, 2 Ves. & Pca. 102.

the injunction had been so lost, and the plaintiff wished to obtain an injunction on the amended bill, it was necessary to make a special application for such injunction (*b*).

Whether an order to amend a bill after the common injunction had been obtained, and before answer, without prejudice to the injunction, was an order of course, or to be moved for specially, was, before the orders of 1839, a point unsettled by decision. And in a very late case, in which the point was elaborately discussed by Lord Cottenham, his Lordship appears to have inclined to the opinion, that it was not irregular to obtain an order as of course to amend after a common injunction and before answer, without prejudice to the injunction (*c*).

2. The practice on this point is now settled by the second order of May, 1839, which orders "that the plaintiff in any injunction cause, having obtained the common injunction to stay proceedings at law, may, *either before or after* the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause, obtain an order as of course for leave to amend the bill without prejudice to the injunction; but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order, and in default thereof the order shall become void."

Accordingly in a very late case (*d*), Lord Langdale, M. R., has laid it down that an order to amend will not prejudice either the special or the common injunction, and that it would be so whether the words *without prejudice* were inserted or not.

The application of this rule is not affected as regards a special injunction, by the fact of a general demurrer having been put in. It is regular notwithstanding the demurrer,

(*b*) *Home v. Watson*, 2 Sim. 85.

(*d*) *Warburton v. London and*

(*c*) *Ferrand v. Hamer*, 4 My. &
Cr. 143.

Blackwall Railway Company, 2 Beav.
253.

to amend by an order of course, and such amendment will not prejudice the injunction (e).

3. It was the practice indeed before the order of 1839, that, after a *special* injunction, the plaintiff might amend his bill by motion of course, without prejudice to the injunction (f). The rule was thus laid down in *Pratt v. Archer*, that a motion to amend without prejudice to an injunction was a motion of course, and might be made without notice where the injunction had been granted *on the merits*, in other words, when it was a special injunction; but that where the injunction had issued on account of delay, notice must be given, and the amendments stated (g).

And on this ground, where an injunction to stay proceedings at law has been obtained on the merits (h), or being first obtained as an order of course, has been continued on the merits, an application for leave to amend is not a special application, and does not prejudice the injunction. Therefore, since the 3 & 4 Will. IV. cap. 94, it should be made to the Master, and not to the Court (i).

But where the order asked is to be of a special character, such as leave to amend, without prejudice, such parts of the bill as are founded on a mistake not affecting the merits, the application should be made to the Court, because it asks for leave to amend, and something more, which the Master has not, under the 3 & 4 Will. IV., cap. 94, jurisdiction to grant (k).

4. Before the orders of the 9th March, 1839, it was

(e) *Washburn v. London and Blackwall Railway Company*, 2 Beav. 253.

(f) *Mason v. Murray*, Dick. 535; *Proctor v. Henth*, 2 Sim. 488; *Proctor v. Archer*, 1 Sim. & Stu. 433. See the note in 2 Sim. 488, that in this case the injunction was in fact special.

(g) The latter part of the rule, as we have seen, is extinguished by the second order, 1839.

(h) *King v. Turner*, 6 Mad. 255; and see 2 Ves. & B. 331.

(i) *Woodroffe v. Daniel*, 8 Law Journ. 16.

(k) *Rees v. Edwards*, 1 Keen, 465.

held, after considerable conflict of decision (*l*), that where the common injunction obtained for default of answer has been dissolved on the merits on the coming in of the answer, or where it has been moved for and refused on the answer; and then the bill is amended, or a supplemental bill is filed; the plaintiff cannot have injunction until the defendant has made default; and then when the defendant is in default, it must be obtained on special application, on affidavits verifying the amendments (*m*).

But a distinction was taken, that where no injunction was obtained on the original bill, but the plaintiff on the coming in of the answer amended, then on the defendant making default in answering the amended bill, the common injunction was obtainable as an order of course. This point was decided by Lord Erskine in *Nelthorpe v. Law* (*n*); and although this decision was disapproved by Lord Eldon (*o*), it was followed in a very late case (*p*).

5. By the third order of 1839, it is ordered, "that in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead answer, or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments."

This order appears to confirm the practice settled by the cases of *Vipan v. Mortlock*, and *James v. Downs*, and

(*l*) *Travers v. Lord Stafford*, 2 Ves. sen. 19; *Amb.* 104; 11 Ves. 569; *Lady Markham v. Dickenson*, 1 Ves. jun. 20; *Edwards v. Jenkins*, 3 Br. C. C. 425; and see *Eden on Injunctions*, 124, *et seq.*

(*m*) *Vipan v. Mortlock*, 2 Mer. 479; *James v. Downs*, 18 Ves. 522; *Bliss*

v. Boscawen, 2 Ves. & B. 101.

(*n*) 13 Ves. 323.

(*o*) *Bliss v. Boscawen*, 2 Ves. & B. 102; Lord Eldon in that case erroneously treats the decision in *Nelthorpe v. Law* as his own.

(*p*) *Statham v. Hughes*, 2 Sim. & Stu. 382.

affects this change: that whereas before, a defendant was not in default for want of answer to an amended bill till five weeks after appearance, and consequently the plaintiff was not till the expiration of that time entitled to an injunction, he may now move for it in eight days after appearance, if the defendant is then in default. Whether the order referred to will be held to apply to cases of the class of *Statham v. Hughes*, where no injunction has been moved for on the original bill, seems questionable.

Mr. Danell observes on this order, that the injunction granted under it is special, and will be till answer or further order; and that consequently the defendant will be allowed to move before answer to dissolve it, upon affidavit in reply to that upon which the injunction has been granted; and that in such affidavit, he may show, it seems, as cause for dissolving the injunction, that the matter introduced by way of amendment was in the knowledge of the plaintiff at the time when he filed his original bill.

6. It has been held under the old practice, that the mere obtaining an *order to amend* would not of itself dissolve the injunction; and that, unless the *record* was actually altered, the injunction was not gone (*q*).

It has been also laid down under the old practice, that a plaintiff desiring, after a common injunction obtained on the ground of delay, to amend without prejudice, ought to give a notice of motion to the defendant, and state the proposed amendments (*r*). The two foregoing authorities do not appear to have any application since the second order of 1839.

7. The general order referred to (*s*) does not in terms touch the cases where the answer is excepted to. Before

(*q*) *Davis v. Davis*, 2 Sim. 515.

(*r*) *Pratt v. Archer*, 1 Sim. & Stu. 433.

(*s*) Second Order of May, 1839.

that order it had been held in numerous cases, that where the common injunction had been obtained for default of answer, and on the answer coming in, exceptions to it had been submitted to or allowed, or not answered, the order to amend, if obtained, was of course without prejudice (*t*).

It does not appear to be settled whether under such circumstances it was an order of course to amend without prejudice, or whether the application must have been specially made. In *Adney v. Flood* it was said, that the motion for leave to amend must be specially made; but that if the order is obtained, it is of course *without prejudice*, whether those words are inserted or not. In *Dipper v. Durant*, on the other hand, it was held to be a motion of course to amend after exceptions taken, and not answered. But if the exceptions had not been argued, the motion to amend must have been specially made; for it was held that it was irregular to obtain an order to amend the bill till the exceptions had been disposed of; because by the exceptions the defendant was deprived of moving on his answer to dissolve the injunction, and therefore the plaintiff should not indirectly be permitted to give himself an opportunity of amending without prejudice to the injunction, without having a special order for that purpose (*u*). But although the second order of 1839 in terms does not apply to these cases, it seems in substance to apply to them. For since the order gives liberty to amend as of course without prejudice, whether *before or after* the answer, it seems immaterial to consider whether the defendant has admitted his answer to be no answer by submitting to the exceptions, or whether the answer is to be treated as a full answer. In either case the plaintiff may under the order obtain an order of course to amend without prejudice.

(*t*) *Adney v. Flood*, 1 Mad. 449; *Ashton*, 3 Ves. & B. 144.

Mayne v. Hochin, Dick. 255; *Dipper* (*u*) *Dixon v. Redmond*, 2 Sch. & v. *Durant*, 3 Mer. 465; *Sharpe v. Lef*, 515.

8. The orders of 1832 do not either in terms refer to re-amendments; on that point it will probably be held that the old practice remains in force, and that re-amendments without prejudice to the common injunction will only be allowed on special application, that the Court may see whether they are material, and on proof by affidavit that they relate to facts at which the plaintiff had not a knowledge, enabling him to bring them on the record *amici* (x).

9. Before the third order of 1839 it was held, that the tenth order of 1823, so far as regarded injunctions, did not apply except to injunctions to be granted on original bills; consequently that the plaintiff could not have an injunction for default on an amended bill, till five weeks after appearance in a town cause, and seven weeks in a country cause (y), if the amendment was made *after* appearance; but if the amendment was made *before* appearance, that rule did not apply (z).

But now by the third order of 1839, it appears immaterial whether the amendment is made before or after appearance; in either case, if the defendant makes default in pleading, answering or demurring, within eight days after appearance, the plaintiff may have an injunction on his amended bill, on affidavit of the truth of the amendments (a).

10. The operation of the third order of May, 1839, it will be observed, is confined to the cases where the injunction is prayed by the original bill. Therefore it is presumed that if a bill does not pray for an injunction at all and is amended, the case will fall within the rule of *Lee v. Ravenscroft*, and that the plaintiff will not be entitled to move for an injunction on the amended bill, until

(x) *Sturge v. Ashton*, 3 Ves. & B. 144.

(y) *Lee v. Ravenscroft*, 6 Sim. 474.

(z) *Brown v. Newall*, Cooke's Orders, 78.

(a) See third order, 9th May, 1839.

the time for answering the amended bill has expired. But where a bill prayed for an injunction in the prayer, but did not in the prayer of process, and an application for an injunction on the merits confessed in the answer had been on that account refused, the bill being afterwards amended by adding a prayer for an injunction in the prayer of process, and the motion for an injunction on the merits renewed almost immediately, Sir L. Shadwell, V. C., said the case was distinguishable from those which had been cited, because the injunction had been prayed for in the original bill, and therefore he should hear the motion on the merits (*b*).

11. It was decided in an early case, where the plaintiff, having obtained the common injunction, excepted to the answer, and the exception was allowed; and he then obtained an order to amend, and that defendant should answer exceptions and amendments together;—That if the defendant puts in a further answer *before* the plaintiff has obtained the order to amend, and for the exceptions and amendments to be answered at the same time, the injunction will stand or fall on the *original* bill and the answer to it. But that if the defendant lets the order to amend be obtained, he suffers the original and amended bills to become one record, and must then answer both at once (*c*). In other words, if the defendant answers the exceptions before the plaintiff obtains the order to amend, &c. the defendant may have the advantage of the order to dissolve *nisi* on putting in his answer to the exceptions, without reference to the question whether his answer to the amendment is sufficient or not. And it appears by a late case, that the defendant may put in a further answer till the order is actually served, and may on such further answer move for the order *nisi*. Notice of the order to amend, &c. being applied for, or even, it seems, of its being actually

(*b*) *Wood v. Beadell*, 3 Sim. 273.

(*c*) *Mayne v. Hochin*, Dick. 255.

made, will not, nor will any thing short of the order being actually served, prevent him from doing so (*d*).

12. When a notice of motion for an injunction is given, an amendment of the bill under an order of course waives such notice; and if the plaintiff wishes to save his notice of motion, he should make a special application for leave to amend without prejudice to it (*e*). And after amending an injunction bill, it is irregular to move on a notice of motion given before the amendment, because such notice is a notice on a record no longer in existence, and on the existing record there is no notice of motion (*f*).

13. Where an injunction has been obtained upon an answer held insufficient by the Master, and afterwards the Court upon exceptions to the Master's report holds the answer sufficient, whereby the injunction is gone, the injunction will not be revived merely because a rehearing of the Master's report is pending (*g*). And in a case in Ireland, where exceptions were not filed in time to show cause against dissolving the injunction, and it was accordingly dissolved, but exceptions were afterwards filed and allowed, a motion being made thereupon to revive, the Court said the injunction was regularly gone, and could not be revived on that ground (*h*).

14. If the bill charges that by certain books and papers contained in a schedule to the answer, and admitted to be in the defendant's possession, ground for an injunction will appear, and on a motion to dissolve the common injunction, it is allowed to stand to a certain time for the purpose of inspecting those documents, the proper course is not to let

(*d*) *Leyburn v. Green*, 2 Russ. 577; 51.

and see the cases cited 1 Daniell

Pract. 529, n. (*e*).

(*e*) *Martyn v. Just*, 8 Sim. 199.

(*f*) *Garthwaite v. Rippon*, 1 Beav.

(*g*) *Scott v. Mackintosh*, 1 Ves. & Bea. 503.

(*h*) *Walker v. O'Sullivan*, 2 Mol. 366.

the injunction be dissolved and then to amend the bill by introducing the matter thus disclosed, and to move to revive the injunction ; but the plaintiff should oppose the dissolution of the injunction on the matter thus discovered, for the matter so referred to in the schedule is part of the answer, and on that the Court would decide whether to sustain or dissolve the injunction (*i*).

(*i*) *Powell v. Lassalette*, Jac. 549.

CHAPTER IV.

Of Breach of an Injunction and its Consequences.

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| 1. What constitutes Breach of an Injunction. | 6. Party entitled to relief notwithstanding Breach, supplied to by Laches. |
| 2. Construction of Breach of an Injunction. | 7. Of Breach by procuring a person to do. |
| 3. What is a Breach. | 8. Construction of Breach of Injunction, and proper Course Against the Parties committing it. |
| 4. Construction of the Practice of an Injunction. | 9. Appropriate Order in relief in Order, and when to be altered. |
| 5. Effect of Breach of an Injunction. | |

1. AN injunction operates from the date of the order being made, and not merely from the time of its being sealed, or even from the time of its being drawn up (*a*). And therefore where an injunction had been obtained to restrain waste, and before the order was drawn up, notice of its having been obtained and of its purport was served on the defendant, who nevertheless continued acts of waste, he was held guilty of a breach of the injunction. And the Lord Chancellor intimated that he would sign the warrant for committal, provided there had been no delay in getting the order drawn up, sealed and served (*b*).

To be guilty of a breach of injunction, the party must have notice of it; but although *regularly* notice should be served by the plaintiff, yet if the defendant or his attorney is present when the order is *pronounced* (*c*), it is a breach of the injunction afterwards to take the plaintiff in execution.

(a) See *Buttray v. Bishop*, 3 Mal. 220.

Vol. & B. 149.

(b) *Vanvortton v. Rice*, 2 Jar. & W. 264, and see *Kempson v. Lee*, 2

(c) *Amos*, 3 Atk. 567, *Scott v. Barker*, 4 Price, 346, *Pyne v. Follett*, Dick. 116.

Or if the defendant, by being in Court at the *hearing of the motion*, is apprised that there is an order, he shall not avoid its consequences, by leaving the Court before the order is *actually pronounced* (*d*).

In *Kimpton v. Eve* (*e*), it was held that it is a breach of an injunction to proceed to sale after personal service of a notice that an injunction against selling has been granted, where the party so proceeding, admits that he believed the order to have been made. And it is not necessary, to constitute a breach of the injunction, that the injunction should be actually served.

So if a party have by himself or by his attorney, notice in any other way of the fact of an injunction having been granted, though it should not be regular notice, it is a breach of the injunction to disobey it (*f*). But if the plaintiff is guilty of delay in getting the order drawn up and served, the Court will not treat the defendant as in contempt, although he should have been present at the hearing of the motion (*g*). The distinction seems, that the defendant shall not escape the process, if he has heard the motion, merely by turning his back upon the Court so as not actually to hear the order pronounced; but that on the other hand, the order is not to be kept suspended over his head unenforced for an indefinite length of time (*h*).

It appears by an old case, taken from Lord Nottingham's manuscripts, that service of an injunction by serving a copy and showing the original, without allowing examination of it, is regular (*i*).

2. It is to be observed also, that one may be guilty of a breach of an injunction by aiding and abetting those who are committing an act inconsistent with it, although he

(*d*) *Hearn v. Tenant*, 14 Ves. 136;

Skip v. Harewood, 3 Atk. 564.

(*e*) 2 Ves. & B. 349.

(*f*) *Lawes v. Morgan*, 5 Price,
518; *Powell v. Follett*, Dick. 116.

(*g*) *James v. Downes*, 18 Ves. 522.

(*h*) *Vide* Lord Eldon's observations
in *James v. Downes*, 524.

(*i*) *Woodward v. Earl of Lincoln*,
3 Swans. 626.

should not actually take part in such act. Thus where the contest was between a college at Oxford and the poor people in the neighbourhood, as to the right of cutting wood in a certain wood, and an injunction had been granted to restrain A. and his servants and workmen, &c. from cutting the wood, it was held a breach of the injunction in A. to be present and acting as a leader, when a great number of the poor people drove away the servants of the college and cut wood, although A. not only did not actually assist, but used words of counsel to the people, dissuading them from violence. The ground was, that remaining and acting as a leader, and not actually interfering to prevent the acts, he was inferentially aiding and assisting (*k*). And the jurisdiction seems to have been stretched still further in an old case already referred to (*l*), from which we may collect that there may be a contempt committed even by assisting in the official act of a person acting under lawful authority. In the case to which I refer, it was held that a breach of an injunction to quiet possession, was committed where the party enjoined had assisted a justice of the peace in making restitution on a forcible entry.

3. It is however no breach of an injunction, for a person not a party to the suit and who has not acquired a right *pendente lite* from any one as a party, to exercise a right which he had antecedently to the suit (*m*). Nor is it a breach of an injunction staying execution with leave to proceed to judgment, if the defendant takes out a *scire facias quare executio non*, because that is only proceeding to judgment (*n*).

In an old case, where an injunction was granted against the *attorney* of the defendant to restrain him from pro-

(*k*) *St. John's College v. Carter*, 8 Law Journ. 218.

(*m*) *Boote v. Stanley*, 2 Eq. Ab. 528.

(*l*) *Woodward v. Earl of Lincoln*, 3 Swans. 626.

(*n*) *Hunkey v. Morris*, *ibid*.

ceeding at law, it was held a breach of the injunction for the *defendant* to proceed (*o*).

4. Where the common injunction has been obtained before the declaration in the action at law has been delivered, the injunction stays *all* proceedings; whereas if the declaration has been delivered, the injunction stays only *execution*, leaving the plaintiff at law at liberty to take all such intermediate steps at law as he is in a condition to take (*p*).

In the first case, therefore, it is a breach of the injunction to deliver a declaration (*q*). This appears to have been formerly doubted, on the ground of a proviso in the order for an injunction, to the effect that the defendant is to be at liberty to call for a plea, and to proceed to trial; and for want of a plea, to enter up judgment. But these words are not to be construed that every man who thinks proper to be a plaintiff at law, should have liberty to go on to demand a plea; but are only to be applied to a party who has *antecedently to the injunction* put himself in a position to go on to demand a plea at law (*r*). And therefore where a party had delivered only a *conditional* declaration at law, that was not held the commencement of an action; and consequently the common injunction having been obtained against him, he was held guilty of a breach of the injunction, by obtaining, after bail excepted to and not justified, a rule on the sheriff to bring in the body of the plaintiff in equity (*s*). *A fortiori* where there has been no declaration at all, as in a case where the plaintiff in equity had obtained the common injunction after four proclamations under a writ of *exigent*, and then the plaintiff at law sued out a writ of *allocatur exigent*, to compel the sheriff to make a

(*o*) *Segewick v. Redman*, Cary, 44.

(*p*) *Anon.* 2 Eq. Ab. 529; and see Smith's Pract. 610; 3 Dan. 281, 365, and the cases there referred to.

(*q*) *Mills v. Cobby*, 1 Mer. 3; and

see also 3 P. Wms. 147.

(*r*) *Bullen v. Ovey*, 16 Ves. 141.

(*s*) *Ibid.* .

fifth proclamation (*t*). It may perhaps be thought strange that the point should ever have been raised, as it seems clear that liberty to demand a plea, must mean liberty to take that particular step at law constituting the demand of a plea, and not liberty to do some other incidental act. The language of Lord Macclesfield, in a case in *P. Williams* (*u*), is referred to, it is true, in support of the doubt. In that case his Lordship said, that if it had not been for some resolutions to the contrary, he should have thought that the delivery of a declaration would be no breach, because by the terms of the order the plaintiff is at liberty to proceed to trial, and the delivery of a declaration is an incident without which there can be no trial. But to these observations it may be replied, that if that were the construction of the order, we should impute to it a very inaccurate use of terms; for the term *plaintiff* would be very inaccurate as applied to a party who, not having commenced an action, cannot properly be called a *plaintiff*; and the words *proceed to trial*, seem of themselves to imply that some previous step has been taken.

5. It is also a breach of an injunction staying trial, to give notice of trial after that injunction has been obtained; for as a plaintiff in equity who has obtained the common injunction, is not compellable to go to trial till he has seen the defendant's answer, it is not reasonable that he should be compelled to *prepare* for trial before he has seen such answer (*v*). Where an award has been made a rule of a Court of law, that has been however held a commencement of the proceeding at law; therefore an injunction obtained afterwards, only stays execution of it; and it is no breach of the injunction, to obtain a rule to show cause why an attachment should not issue for non-performance of the award (*x*).

(*t*) *Marsack v. Bailey*, 2 Sim. & Stu. 577.

(*u*) 3 P. Wms. 147.

(*v*) *Bird v. Brancker*, 2 Sim. & Stu. 186.

(*x*) *Franco v. Franco*, 2 Cox, 420.

Where an injunction has been obtained against a plaintiff at law, it is a breach of the injunction if he gives notice of declaration at law against the bail of the defendant at law, after the order has been made, although before it is served (*y*); but it is not a wilful breach, and therefore not to be punished by commitment; but the attorney of the plaintiff at law will be ordered to pay the costs.

In an old case it was held, that if the sheriff has levied under a judgment and execution, and after that, the defendant at law obtains the common injunction, it is a breach of that injunction to attach the sheriff and receive the money. But the Lord Chancellor said it would be different if the sheriff had paid it voluntarily (*z*). This decision is, however, supposed to be the one doubted by Lord Eldon in *Franklyn v. Thomas* (*a*).

Where, however, legal process had been put into the sheriff's hands before the issuing of any injunction, and after the issuing of the common injunction, the plaintiff at law, being applied to by the sheriff for further instructions, did not stop the process; it was held that refusing to countermand the writ, was an actual continuance of the order previously given by the plaintiff at law to the sheriff, and was a contempt (*b*). But in this case the Court, though holding it contempt, would not make an order of committal, but ordered the plaintiff at law to pay the costs of the motion, and to lose the benefit of any proclamation made subsequently to the service of the notice of motion to commit.

So it is a breach of an injunction staying proceedings at law, to lodge with the sheriff an attachment for non-payment of costs, although such costs may have been actually taxed before the issuing of the injunction. And though the Court should see that if the circumstances of the case had been fully explained to it at the time when the injunction was

(*y*) *Leonard v. Attwill*, 17 Ves. 385. Chanc. Pract. 274, n. (*l*).

(*z*) *Axe v. Clarke*, Dick. 549.

(*b*) *Woodley v. Boddington*, 9 Sim.

(*a*) See 3 Mer. 234; and 2 Mad. 214.

granted, it would not have been so extensive, it is nevertheless a breach; but in such a case the Court will, as in the last case, refuse to commit the defendant for contempt, and will content itself with making him pay the costs occasioned by the breach, and by the motion for committal (*c*).

So if a creditor proceeds at law against an executor, after notice of a decree against the latter to account, it is so far a contempt of Court, that, upon a motion for an injunction to restrain further proceedings at law, the Court will refuse the creditor the costs of the further proceedings at law, and the costs of the application (*d*). This is in another form the rule already stated, that on a motion in a creditor's suit to restrain the creditor, he will have his costs at law until notice of the decree in equity, but not further; and the costs of the motion will depend upon whether he had then notice of the decree.

6. It must be observed, that although the common injunction obtained before any proceedings at law are commenced, stays all proceedings at law, the party entitled to that advantage may lose it by laches. Thus in a case where the common injunction issued on the 21st February, and declaration in ejectment was served on the 19th May following, and the plaintiff in equity appeared, and pleaded to the action and took other defensive steps, and suffered notice of trial to be given; and never gave notice to the plaintiff at law that he was in contempt till three days before the opening of the commission; Lord Eldon refused to make any order on a motion to commit the defendant for contempt, and gave no costs on either side (*e*).

7. In an early case (*f*) Lord Hardwicke took a distinction between the case where bail is put in above by the de-

(*c*) *Partington v. Booth*, 3 Mer. 148.

(*d*) *Curre v. Bowyer*, 3 Mad. 456.

(*e*) *Mills v. Cobby*, 1 Mer. 3.

(*f*) *Stone v. Tuffin*, Amb. 32.

fendant at law, and where it is put in below. In the first case, he said an injunction to stay proceedings against the principal extends to stay proceedings against the bail, because in that case no proceedings can be taken against the bail until they have been taken against the principal. But that when the bail is put in below, the plaintiff at law has his election to proceed against either; the order, however, made in the case was to stay proceedings on the bail bond, although bail had been put in below. And the practice is now to disregard Lord Hardwicke's distinction, and to treat an injunction to stay proceedings against the principal, as extending to stay proceedings against the bail (*g*).

But if there be proceedings against the obligor of a bond and his surety, and the principal obligor files his bill without *making the surety a party*, and obtains the common injunction for want of answer; it is not a breach of the injunction to issue a *capias* against the plaintiff and the surety, provided instructions are given to the sheriff's officer only to take the surety; for although in point of *form*, issuing the writ is a proceeding against the plaintiff as well as the surety, *substantially* it is only a proceeding against the party against whom there is no injunction (*h*).

And where the obligor of a bond filed his bill for an injunction to restrain the obligee, assignee, and others from proceeding at law upon the bond, and the common injunction for want of answer was obtained, but issued only against the obligee, his *counsellors and agents*, and did not name the *assignee*, Lord Lyndhurst thought it a question of considerable doubt whether the assignee was bound by the injunction, the action not being brought with the privity of the obligee. (*i*).

8. As a breach of an injunction is a contempt of the Court,

(*g*) *Leonard v. Attwill*, 17 Ves. 385; in this case it does not appear whether bail was put in above or below. And see 1 Ves. & Bea. 19.

(*h*) *Chaplin v. Cooper*, 1 Ves. & Bea. 16.

(*i*) *Montague v. Hill*, 4 Russ. 128.

the consequence is liability to be committed to prison for the contempt. Where an injunction is *to do a thing*, and the party neglects or refuses, the course to compel him is to move that he shall do it by a particular day, or stand committed; but where the injunction operates strictly by way of restraint, as where an injunction had been granted to restrain a party from ploughing up a rabbit warren further than was necessary for the sustenance of the rabbits, a motion that the defendant shall show cause why he should not stand committed for breach of the injunction is irregular. The proper course is either to move that the defendant be committed for breach of the injunction; or else to move that he be committed, unless he show cause at a future day to the contrary. If the first course is adopted, the motion must be made on personal service of notice of motion (*k*). Service on the defendant's clerk in Court will not do by itself (*l*), and is unnecessary when there is personal service (*m*). In *Ellerton v. Thirsk*, Lord Eldon is reported to have held that the order cannot be made, unless the original writ of injunction is brought into Court. But in a very late case, Lord Cottenham thought a party having notice of an injunction, and being guilty of a breach of it, may be committed without production of the writ, observing that he did not think Lord Eldon could ever have laid down such a rule (*n*).

(*k*) *Angerstein v. Hunt*, 6 Ves. 488.

(*l*) *Ellerton v. Thirsk*, 1 Jac. & W. 376.

(*m*) *Bowdler v. Bowdler*, 9 Law Journ. N. S. 394.

(*n*) *M'Neil v. Garratt*, 1 Craig & Phil. 108. It would seem, from the language of Lord Cottenham in *M'Neil v. Garratt*, that it must have been argued in that case that in *Ellerton v. Thirsk* Lord Eldon meant to lay down the rule, that a party cannot be punished for disobedience to an order till after the writ has issued. And to this

construction of Lord Eldon's decision it is submitted that Lord Cottenham addressed his observation. It is conceived that the decision in *Ellerton v. Thirsk* only goes to this extent, that where the writ for an injunction has issued, it ought to be produced on a motion to commit for contempt of that injunction; and taking this view of the case, the decisions in *Ellerton v. Thirsk* and *M'Neil v. Garratt* seem perfectly in harmony; as all that Lord Cottenham decided in the latter case was, that according to the esta-

If the second course is adopted, then the defendant is personally served with the order *nisi*, and the plaintiff, at the proper time for showing cause, moves to make the order *nisi* absolute (*o*).

9. And here it may be observed, that although an injunction should have been irregularly obtained, still it is the order of the Court, and must be obeyed (*p*). The proper course is not to treat it as a nullity, but to apply to the Court to discharge it for irregularity (*q*). It has been lately held in a case in Ireland, that to support a motion to commit for breach of an injunction, the affidavit must specify the particular act constituting such breach. A general allegation that the defendant has violated the order is not sufficient (*r*).

blished practice, a party is bound by an order from the time of its being made, and may therefore be guilty of and committed for a contempt of it, before the writ has issued.

(*o*) 2 Russ. & M. 33.

(*p*) *Woodward v. Earl of Lincoln*, 3 Swanst. 626; and see *Partington v. Booth*, 3 Mer. 149.

(*q*) *Ibid.*; and see *Robinson v. Lord Byron*, Dick. 703.

(*r*) *Morris v. Morris*, 1 Hog. 238.

CHAPTER V.

OF THE PRACTICE IN DISSOLVING INJUNCTIONS.

SECTION I.

As to dissolving Injunctions to stay Proceedings at Law.

1. *General Rule that Application to dissolve must be by Motion.*
2. *Regular Course of Proceeding to dissolve.*
3. *If Exceptions are shown for Cause, and not sustained, the Injunction falls.*
4. *When the Plaintiff may move to revive.*
5. *Proper Course when Order Nisi has been improperly obtained.*
6. *Effect of Plea on Right to dissolve.*
7. *When a special Application may be made to dissolve without an Order Nisi.*
8. *Of References for Scandal and Impertinence.*
9. *Extent of the Similarity between Reference for Insufficiency and Reference for Impertinence.*
10. *Practice on References for Insufficiency.*
11. *Effect of Delay on Defendant's Right to obtain Order Nisi on putting in his Answer.*
12. *Effect of Delay in giving Notice of the Injunction, on the Plaintiff's Right to sustain it.*
13. *Of losing the Right to show a particular Cause against dissolving.*
14. *Ground for Dissolving under the Second General Order, 1839.*
15. *Practice where Order Nisi is obtained on the eve of the long Vacation.*
16. *Where Master's Report not made in the Time limited, special grounds requisite to obtain Extension of Time.*
17. *Defendant may by Answer waive Objection that an Injunction is not prayed by the Bill.*
18. *Of showing Exceptions for Cause against an Infant's Answer.*
19. *Exceptions to the Rule that where there are several Defendants, an Injunction cannot be dissolved against one till all have answered.*
20. *Generally there cannot be an Order to dissolve an Order to extend, as separate from the Order for an Injunction.*
21. *Practice where there has been a Verdict, and the Plaintiff at Law is abroad.*
22. *Effect of Injunction on Dismissal of the Bill.*
23. *Distinction in regard to the Effect of a Demurrer, where the Injunction is issued before, and where after Execution.*

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| <p>24. <i>Whether Bankruptcy of Plaintiff is an Abatement, and Effect of the Doctrine on that Point on an Injunction.</i></p> <p>25. <i>Proper Course when a Special Injunction to stay Proceedings at Law has been improperly obtained,</i></p> <p>26. <i>Practice as to reading Affidavits.</i></p> <p>1. <i>General Rule.</i></p> <p>2. <i>When Affidavits may be read for the Plaintiff.</i></p> <p>3. <i>State of the Rule as to Deeds, and as to Facts.</i></p> | <p>4. <i>Morgan v. Goode, and Hodgson v. Dean.</i></p> <p>5. <i>Answer Evidence only as to Facts of which other Evidence might be admitted.</i></p> <p>6. <i>Where Answers are treated as Affidavits, and may be met by Affidavits.</i></p> <p>27. <i>What Affidavits of Waste requisite to support Motion to dissolve Injunction against a Verdict in Ejectment.</i></p> |
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1. **GENERALLY** an injunction, of whatever kind it may be, can only be dissolved on motion in open Court^(a), and I am not aware of any reported case to the contrary in the Court of Chancery. It is said, however, that occasionally in extremely pressing cases, the Lord Chancellor has, in the vacation, appointed a special hearing at his house for the purpose^(b). There is a case in the Exchequer^(c) in which an injunction to stay the transfer of stock by the bank, was dissolved on petition. The sum was very small, and the petition was presented by the parties solely interested in the stock, and was consented to by the representative of the testator. It need scarcely be observed, that an order made under such circumstances can hardly be treated as of any authority.

2. The proper course to dissolve the common injunction is, upon the answer coming in, to obtain on motion or petition as of course, an order *nisi*; that is, an order that unless on a future day the plaintiff shows good cause to the contrary, the injunction shall be dissolved. The ground of the order *nisi* is the assumption that the defendant has put in a full answer, and thereby rebutted the plaintiff's

^(a) See Eden on Injunc. 326; 3 Dan. Pract. 355.

^(c) *De Beaufort v. Archdeacon*, 1 Y. & C. 549.

^(b) Eden on Injunc. 326.

equity. Therefore the mere filing a plea does not entitle the defendant to the order *nisi* to dissolve, because there no such assumption can be made (*d*). The Court, on making the order *nisi*, fixes a time for showing cause, which is usually four days; but if the plaintiff intends to show cause on the merits, it is usual to allow him till the following seal day. The principle of this is, that the defendant shall not move immediately on putting in his answer, without giving the plaintiff time to look into it, and see whether it is a proper answer. Formerly, the order *nisi* could only be obtained on motion, but by the 23rd General Order of 1828, the order *nisi* may be obtained on petition as well as on motion; and the order must be served two clear days at least before the day on which cause is to be shown against dissolving the injunction.

On the day for showing cause, the defendant moves to make the order *nisi* absolute, and the plaintiff then elects whether he will show for cause objections to the answer, or the merits as they appear upon it.

3. If electing the former course, he excepts to the answer for insufficiency, and cannot maintain the exceptions, the injunction is gone. For it was early held, that if an injunction obtained for want of answer is attempted to be maintained against an order *nisi*, by exceptions shown for cause, it is *ipso facto* dissolved, on the Master reporting the answer sufficient; and is not in general by exceptions to the Master's report sustained until those exceptions shall have been argued (*e*).

So in a late case, where the common injunction had been obtained, and then exceptions to the answer, and the further answer being reported sufficient, exceptions were taken to the Master's report; the Court held, that for the purpose of dissolving the injunction, it would act upon that report as if it had not been excepted to; and there-

(*d*) *Wroe v. Clayton*, 8 Law Jour. 356.

Bishton v. Birch, 2 Ves. & B. 42; see also 2 Dan. Pract. 318.

(*e*) *Botham v. Clark*, 2 Cox, 428;

fore an order *nisi* to dissolve the injunction, obtained on the Master's report pending the exceptions to it, was held regular(*f*).

4. But if on arguing the exceptions to the Master's report, the Court thinks the answer insufficient, the plaintiff may thereon move to revive the injunction (*g*).

5. Where an order *nisi* to dissolve an injunction for want of answer has been irregularly obtained, the plaintiff cannot show the irregularity for cause, for by showing cause he admits the answer. The proper course is to move to discharge the order for irregularity (*h*).

6. The defendant may move on a plea to the whole bill allowed, to dissolve absolutely an injunction obtained for want of answer, because a plea allowed is to be considered as a full answer(*i*). But when on argument a plea is ordered to stand for an answer, the defendant cannot obtain an order to dissolve at once, but only an order *nisi*, as on an answer (*k*).

7. Under special circumstances also the Court will allow a motion for a special order to dissolve at once(*l*). And when the principle requiring the order *nisi* has no application, the order itself is unnecessary, and the defendant may move at once to dissolve. Thus, where the common order *nisi* had been obtained, and on the day for showing cause the plaintiff referred the answer for impertinence, and the answer being reported impertinent, the impertinence was expunged; and then the plaintiff took exceptions, which were finally overruled; Lord Eldon held it regular to move at once to dissolve, without again obtaining the

(*f*) *Merest v. Coster*, 1 Sim. & Stu. 486.

(*g*) *Botham v. Clarke*, 2 Cox, 428.

(*h*) *Hall v. Darney*, Dick. 289.

(*i*) *Philips v. Langhorne*, Dick. 148.

(*k*) *Osborn v. Cowper*, Mos. 198.

(*l*) *Sharpley v. Perring*, 8 Sim. 600.

order *nisi*; as it was plain that under the circumstances he had already all the necessary information from the answer(*m*); in other words, the impertinence being expunged, and the exceptions being overruled, there was a full answer before the Court; and therefore there was no ground for an order *nisi*, the principle of which is, that the plaintiff may elect whether he will meet the motion on the merits confessed by the answer, or treat the answer as insufficient.

8. In an early case(*n*) Sir Lloyd Kenyon, M.R., would not allow a reference of the answer for scandal and impertinence, as cause against dissolving the common injunction; and it is said by the reporter that Lord Thurlow was of the same opinion in a case of *Henry v. ———*(*o*). But in another case, the Court said that if an order to dissolve *nisi* were obtained pending a reference for impertinence, the reference would be cause against dissolving, because pending the reference it cannot appear what part of the answer will remain on the record(*p*). And it is now well settled by later cases, that a reference of the answer for impertinence is good cause against dissolving the common injunction(*q*).

The reason is, that an answer cannot be referred for insufficiency if the plaintiff means to refer it for impertinence; as there must be a judgment upon the reference for impertinence before there can be a judgment on the reference for insufficiency; and as exceptions may be shown for cause against dissolving the injunction, all proceedings necessarily preceding them must also be sufficient cause(*r*). In *Goodinge v. Woodham*, Lord Eldon, however, put the plaintiff on terms to procure the report on the reference for impertinence within a week(*s*).

(*m*) *Lacy v. Hornby*, 2 Ves. & B. 291.

(*n*) *Golding v. Milner*, Dick. 672.

(*o*) *Ibid.*

(*p*) *Kenny v. Barnwell*, 2 Cox,

26.

(*q*) *Fisher v. Bayley*, 12 Ves. 18; *Goodinge v. Woodhams*, 14 Ves. 534;

and see 2 Dan. Pract. 297.

(*r*) 14 Ves. 536.

(*s*) 14 Ves. 537.

9. The analogy between a reference for insufficiency and for impertinence went, under the old practice, thus far; that if a reference for impertinence was shown for cause against dissolving an injunction, and the report was to be made within four days, and it was not made, the injunction was dissolved. But if afterwards the Master reported the answer impertinent, it has been held that the plaintiff could not revive the injunction (*r*), as he could if the answer was reported and held insufficient. The ground on which this was put in *Dansey v. Brown* was, that if an answer was reported impertinent, the defendant had no means of immediately proceeding, but was in the power of the plaintiff, who alone could move to expunge the impertinence. It has however been observed (*s*), and as I submit with justice, that the reasoning of this case is displaced by the case of *Kenny v. Barnewall* (*t*), which was not cited in *Dansey v. Brown*. In *Kenny v. Barnewall* a motion was made to discharge an order *nisi* for irregularity, on the ground that the order was obtained on a suggestion of a full answer, whereas the answer had been referred for impertinence, and reported impertinent, and the impertinence not expunged; but the Court held, that although pending a reference for impertinence the defendant could not move to dissolve, because it would not appear what part of the answer could remain on the record, yet as the Master's report particularized the lines and words impertinent, it was not necessary, after the Master's report, to have the impertinence actually expunged before the defendant could move to dissolve. But if the Master reports the answer not impertinent within the limited time, the injunction is gone, and exceptions to that report are no ground for opposing the order to make the order *nisi* absolute (*u*).

The similarity between references for insufficiency and references for impertinence has been carried further on

(*r*) *Dansey v. Brown*, 4 Mad. 237.

(*t*) 2 Cox, 26.

(*s*) Eden on Injunctions, 98; 2

(*u*) *Corson v. Stirling*, Coop. 93.

Dan. Pract. 299.

another point by the eleventh order of 1828, which makes it necessary that an order to refer any pleadings for scandal or impertinence should be grounded on exceptions (*x*). Mr. Daniell, after stating the rules laid down by the cases of *Fisher v. Bailey* (*y*), *Goodinge v. Woodhams* (*z*), and *Dansey v. Brown* (*a*), and observing that it does not appear that any alteration in the practice has taken place in consequence of the new order (11th order, 1828), suggests, however, that the Court will in all probability in future consider that instead of the *order* referring the answer for impertinence being necessary as a cause against dissolving an injunction, the mere *filing of the exceptions* will be a good cause for that purpose, as it is in the case of exceptions for insufficiency (*b*).

10. In general the practice as to referring an answer for insufficiency is, that the order to refer cannot be obtained till eight days after the exceptions are delivered (*c*). But in injunction causes the rule is different. If the plaintiff is in possession of the common injunction only, and it has not been obtained till after declaration at law delivered, then, as it only stays execution and not trial, the plaintiff is entitled, on excepting to the answer for insufficiency, to obtain an order of course to refer it *instanter* for insufficiency (*d*), unless the defendant has obtained the order *nisi* to dissolve, and the exceptions are shown as cause against making the order *nisi* absolute; and then as both parties are before the Court, the order to refer the exceptions *instanter* is made in the presence of both of them, and the order is properly then a special order. But if the plaintiff is in possession of the injunction to stay trial, then there is

(*x*) Before that order it was a motion of course to refer an answer for impertinence or scandal, to be looked into by the Master; 2 Dan. Pract. 295.

(*y*) 12 Ves. 18.

(*z*) 14 Ves. 536.

(*a*) 4 Mad. 237.

(*b*) See 2 Dan. Pract. 298.

(*c*) *Vide* 5th General Order, 1828, Cooke's Orders, 2d ed. 4.

(*d*) *Brooks v. Haigh*, 8 Sim. 558.

no ground for referring the answer *instanter*, and it is irregular to obtain an order of course for that purpose (*e*).

The principle seems, that where the plaintiff has the injunction complete for staying *trial*, no ground exists for referring the answer *instanter*, because the plaintiff cannot be damnified by the delay, as the trial must stay till a proper answer is put in. But where the plaintiff has not all by the injunction that he can have, there the order to refer *instanter* is obtainable, because the trial is not stayed, and the plaintiff may be damnified by the defendant's wilfully putting in an insufficient answer for the purpose of delay (*f*).

11. A defendant may at any time under the general orders obtain an order *nisi* to dissolve an injunction as soon as his answer is filed; but if he waits till exceptions are filed, it is irregular after that to obtain an order *nisi* to dissolve the common injunction obtained for default of answer. This was decided in a case of *Williams v. Davies* (*g*), and the rule laid down in that case has been followed by Lord Langdale in a very late one (*h*).

12. It was held in an early case that if a plaintiff obtained an injunction for want of answer, and then let the answer come in, and the defendant proceed at law to a verdict, and then only served the injunction, it would be discharged (*i*); and on the other hand, where an injunction had been obtained for default of answer to an amended bill, and was extended to stay trial, and then the defendant on putting in his answer took no step to dissolve, but permitted the plaintiff to reply and went into evidence, and let the cause go on till publication of evidence had passed; it was held irregular for the defendant to obtain the order *nisi* to dissolve (*k*).

(*e*) *Candler v. Partington*, 6 Mad. 102; and see 8 Sim. 560.

(*f*) See 8 Sim. 560.

(*g*) 1 Sim. & Stu. 262.

(*h*) *Howes v. Howes*, 1 Beav. 197.

(*i*) See 2 Eq. Ab. 525, sect. 9.

(*k*) *Barnett v. Mole*, 1 Keen, 645.

In the case referred to, a case of *Molineux v. Luard* (*l*) was relied on to prove that the order *nisi* may be obtained after replication and subpoena to rejoin, and rule given to produce witnesses; but in that case it appears from the registrar's book that the order was by consent; and no instance it is said is to be found where an order *nisi* has been made after publication has passed (*m*).

13. Where an order has been made for an injunction, but has not been entered within the time limited by the rules of the Court, an order to enter it *nunc pro tunc* is regular (*n*). But if the common injunction having been obtained, the defendant has obtained the usual order *nisi*, and at the time fixed for showing cause against dissolving the injunction, no cause, or what is the same thing, no sufficient cause is shown, the plaintiff cannot afterwards show exceptions for cause (*o*); and if the plaintiff shows exceptions for cause, and the Master reports the answer sufficient, the plaintiff cannot afterwards move to revive the injunction upon the merits confessed by the answer (*p*). Possibly where a plaintiff has on the original answer failed on the merits, the answer to the exceptions might afterwards furnish a case which would entitle him to an injunction on the merits; but then he must come to revive the injunction, showing that the answer to the exceptions has established a case which if he had had it before would have entitled him to an injunction; but the mere pendency of exceptions will not be sufficient (*q*).

14. And here may be mentioned, among the grounds for dissolving an injunction, that if a party, being in possession of the common injunction, has obtained an order of

(*l*) 2 Dick. 634.

(*m*) 1 Keen, 647.

(*n*) *Harcourt v. Ramsbottom*, 3 Swans. 359.

(*o*) *Ibid.*; *Pinheiro v. Porter*, *ibid.*

362, note.

(*p*) *Peyto v. Hudson*, 3 Swans.

363, note.

(*q*) *Harcourt v. Ramsbottom*, 3 Swans. 359.

course for leave to amend under the second general order of 1839, the defendant may, although he has not put in his answer to the bill or the amendments, move on notice to dissolve the injunction, on the ground that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto (*r*). Before this order it seems that after amendments and injunction revived on special application, the defendant might move before answer to dissolve, on affidavit in reply to that on which the injunction had been revived (*s*).

15. Where an order to dissolve an injunction *nisi* has been obtained of such a date that the motion to make it absolute is made on the last seal before the long vacation, the practice is to order the plaintiff to show cause on some day before the next seal; because to apply the usual practice and allow the plaintiff till the next seal to show cause on the merits, would be to sustain the injunction for three months (*t*).

In a later case it was held that if the order *nisi* has not been obtained, but the motion for that order is made on the last seal before the long vacation, a day will not be fixed during the vacation to move for making the order *nisi* absolute, but the Court will only grant the order *nisi* in the usual form (*u*). But in a still later case, where the motion for the order *nisi* was made at the last seal before the long vacation, a day was appointed during petitions for showing cause (*x*).

16. Where the common injunction having been obtained, exceptions are shown as cause against dissolving it, the order is to refer it to the Master to certify as to the sufficiency of the answer, and the Master's report to be procured within four days, otherwise the injunction to be dis-

(*r*) 2d General Order, May, 1839.

(*u*) *Rew v. Dixon*, 2 Mad. 258.

(*s*) *Vipan v. Mortlock*, 2 Mer. 479.

(*x*) *Fielding v. Capes*, 4 Mad. 393.

(*t*) *Robinson v. Walcott*, 5 Ves. 552.

solved without further order (*y*); and it is said by Mr. Smith (*z*) that if four days are insufficient to enable the Master to report, the time may be extended either by consent in the Master's office, or by application to the Court on notice of motion. But it must not be understood that the time will be enlarged as of course, or even on slight grounds. For it appears by *Davenport v. Whitmore* (*a*) that though the Court may interfere in special cases, as for instance in a case where the cause of delay is the Master's illness, yet where no such extraordinary case is shown the Court will not interfere.

17. It has been stated in a preceding page that a plaintiff must specially pray for an injunction by the bill, in order to be entitled to move for one; but it was held in an early case, that if the defendant, instead of moving to discharge an order for an injunction obtained without being prayed for by the bill, answers, and then on the answer moves to dissolve, he waives the irregularity (*b*).

18. As no exceptions can be taken to an infant's answer, a motion to dissolve an injunction against an infant on his answer, cannot be met by undertaking to show *exceptions* for cause (*c*).

In the case referred to, the answer was insufficient, the case made by the bill being that the life of the defendant (the infant) was put in merely as a trustee, the grandfather of the defendant having paid the fine and remained in undisturbed possession for nearly seventeen years; and the answer merely denied knowledge that the fine was paid by the plaintiff; but the Court said it could not see the trust on the bill and answer, therefore it could not interfere with the legal title, and dissolved the injunction.

(*y*) See 1 Smith's Prac. 281.

(*z*) *Ibid.* 619.

(*a*) 8 Sim. 251.

(*b*) *Davill v. Peacock*, Barn. 25.

(*c*) *Lucas v. Lucas*, 13 Ves. 274.

19. It is stated by a learned writer to be a general rule, that where there are several defendants enjoined, the Court will not dissolve an injunction till all have answered (*d*). This rule is, however, subject to exceptions. In a case before Sir J. Leach (*e*) his Honor discharged an order *nisi* obtained by one of several defendants, suggesting that all the defendants had answered; saying that one of several defendants against whom the common injunction has been obtained, may on filing his answer obtain an order *nisi* to dissolve an injunction as against himself; but he ought not to suggest, contrary to the fact, that all the defendants have answered. But where the case was of two trustees, one of whom refused to bring an action and the other brought it in the joint names, the Court refused to dissolve the injunction against the one who had answered until the other should answer, on the ground that he who was bringing the action could not proceed with it; as the action being in the joint names, it would be a contempt to continue it while the injunction was subsisting against one (*f*).

And in an interpleading bill, one defendant cannot in general, on the coming in of his answer, dissolve an injunction in the usual manner. But if there is any delay in the plaintiff in getting in the other answer, the defendant may, upon that special ground, apply to dissolve, or to have the money paid to him (*g*).

And it is to be observed, that if the bill in an interpleading suit is dismissed, it is not regularly necessary, although it is a very general practice, to apply for an order to discharge the injunction; for when the bill is dismissed, in strictness the injunction falls *ipso facto* (*h*). Indeed, as regards any bill praying an injunction, the better opinion seems that if the bill is dismissed, an injunction

(*d*) 3 Dan. Pract. 285.

(*g*) *Hyde v. Warren*, 19 Ves. 321.

(*e*) *Todd v. Dismor*, 2 Sim. & Stu. 477.

(*h*) *Blennerhasset v. Scanlan*, 1 Hog. 363.

(*f*) *Nanney v. Vaughan*, 8 Sim. 439.

granted on such bill falls with it, without any express motion or order being necessary to dissolve (*i*).

In a case where the defendants to a bill for an injunction to stay proceedings at law, stood in the relation of solvent members of a partnership and the assignees of a bankrupt partner, it was held that if all had answered, it would be competent for the solvent partners to move to dissolve an injunction obtained against all; but the motion would not be granted as regarded those defendants to whose answers exceptions were pending (*k*). This amounts to no more than that the injunction will be dissolved as against those defendants who have actually answered; because, pending exceptions to an answer, it is not a complete answer.

When a bill is filed against a company and their officer, the common injunction obtained against the company will be dissolved on the coming in of their answer, although the officer of the company has not answered (*l*).

20. Although where an injunction is extended to stay trial, there are two *orders*, there is but one injunction. The injunction is whole, and the order to dissolve must be in the usual way, an order to dissolve *nisi*, and the plaintiff shows cause by exceptions, or upon the merits confessed by the answer; and an order will not in general be granted on the coming in of the answer, to dissolve the order extending the injunction to stay *trial*, leaving the order to restrain execution subsisting (*m*); but under peculiar circumstances the order to stay trial will be discharged alone (*n*).

Where the whole equity of the bill, on which an injunction to stay proceedings in another Court has been ob-

(*i*) 1 C. P. Cooper's Cas. 591.

N. S. 30.

(*k*) *Joseph v. Doubleday*, 1 Ves. & Bea. 497.

(*m*) *Earnshaw v. Thornhill*, 18 Ves. 485.

(*l*) *Glascott v. Governor and Company of Copper Miners*, 10 Law J.

(*n*) *Barrett v. Tickell*, Jac. 154; see also 1 Ves. & B. 367, *notis*.

tained, is explicitly and fully denied by the answer, it is clear that the injunction must be dissolved (*o*).

21. Where a verdict has been recovered at law, and the defendant at law files a bill for an injunction, and obtains the common injunction for want of answer, the defendant in equity being abroad; the practice is, that on the motion of the defendant in equity, the plaintiff shall bring the money into Court by a given day, or the injunction stand dissolved (*p*). But if the bill alleges an equity against the verdict, the motion must be supported by affidavits contradicting the bill (*q*).

22. An injunction having been obtained, does not of itself prevent the bill being dismissed on motion of course. The principle is, that after an injunction has been obtained, if the plaintiff takes no step during the time prescribed, the defendant may dismiss the bill for want of prosecution, by motion of course, although there is an order for staying execution, or trial, or even sometimes the commencement of an action (*r*). In those cases, on production of the six clerks' certificate, or on assertion, to which the Court gives credit, that the certificate will be made, the bill is dismissed, and of course the injunction ends (*s*). But if any transaction between the parties renders the motion to dismiss the bill inconsistent with justice, the Court will advert to that transaction on a motion to discharge the order for dismissal. The certificate of the six clerk is not conclusive on the question whether the order shall remain (*t*). And if an order for an injunction affords other advantages, as

(*o*) *Furnival v. Bogle*, 4 Russ. 142.

(*p*) *Sherwood v. White*, 1 Br. C. C. 452; see also *Cotes v. Lindsey*, Dick. 352; *Acton v. Market*, 2 Br. C. C. 14; and *Culley v. Nickling*, 2 Br. C. C. 181.

(*q*) See also *Coglan v. Requeneau*;

Potts v. Butler; *Mitchell v. Davis*, *ibid.* 183, 184, *notis*.

(*r*) *Day v. Snee*, 3 Ves. & B. 170; *Naylor v. Taylor*, 16 Ves. 127; 3 Swans. 244; *Desgraves v. Lane*, 15 Ves. 291.

(*s*) 3 Swanst. 245.

(*t*) *Ibid.*

an understanding not to bring a writ of error, or an early opportunity of applying to the Court, the motion to dismiss will be discharged, unless made on notice (*u*).

It has been also decided, that the pendency of a notice of motion to dissolve an injunction on the coming in of the answer, the motion not having come on by reason of the press of business of the Court, does not make it irregular to obtain the order to dismiss for want of prosecution (*x*).

23. With regard to the effect of a demurrer on the common injunction, where the demurrer is overruled, the injunction is granted of course (*y*). But a distinction is to be observed, when it issues before and when after execution executed. Where no execution of legal process has issued, no difficulty arises, and the injunction has then its ordinary effect of staying execution; but if execution has been executed, by taking the goods of the defendant at law, and at the time of the injunction issuing, the goods are not yet out of the hands of the sheriff, then if the sheriff proceeds to sell without process, he will be ordered to pay the money into Court. The principle is this: While it is in contemplation, whether a good case can be made or not, if it turns out that there is an equitable case in the result of the demurrer, then to deal with it as an equitable case from the first, and to prevent execution. A difficulty occurs where execution has been issued and executed against the plaintiff's *body*; because such taking in execution is a discharge of the debt. Where therefore the plaintiff's body has been taken in execution, pending the demurrer, a special order for the discharge of the defendant will be made, so as to provide against the extinction of the debt, and to put the parties on the same footing as if the injunction had issued before any execution executed (*z*).

(*u*) *James v. Biou*, 3 Swans. 234.

6 Mad. 299, n.; and 3 Mer. 234.

(*x*) *Farquharson v. Pitcher*, 3 Russ. 383.

(*z*) *Franklyn v. Thomas*, 3 Mer. 225.

(*y*) *Rashleigh v. Buller*, Dick. 153;

In the case referred to, it was decided also that a special injunction to restrain proceedings at law, could not be granted on the mere ground that the plaintiff at law would be entitled to sue out execution before the defendant could obtain the common injunction, unless the defendant had not had any opportunity of obtaining the common injunction.

24. A point incidentally connected with the practice on injunctions has been the subject of considerable conflict of decision; viz. whether the bankruptcy of the plaintiff is an abatement of a suit, and requires a bill of revivor before any step can be taken, or whether it requires only a supplemental bill.

In a case in Atkyn in 1748 (*a*), Lord Hardwicke held that the bankruptcy was not an abatement, and on that ground refused to allow that objection to a motion to make an order *nisi* to dissolve an injunction absolute; and obliged the plaintiff to show cause regularly.

In a subsequent case (*b*), on a motion to discharge an order for dismissing a bill, Lord Thurlow held that bankruptcy in the plaintiff was an abatement. While in another case (*c*), the Court had, on the bankruptcy of the plaintiff, ordered a supplemental bill to be filed by the assignees within a given time, or the injunction to be dismissed.

So far, however, as regards injunctions, the course is settled, that on the bankruptcy of a plaintiff who has obtained an injunction, the assignees must be brought before the Court by a bill of supplement, in the nature of a bill of revivor, within a limited time, usually a fortnight; and if they are not, the injunction will be dissolved (*d*).

So where the plaintiff becomes insolvent, an order will

(*a*) *Anon.* 262.

(*b*) *Lingard v. Wegg*, 3 Br. C. C. 435.

(*c*) *French v. Barton*, 18 Ves. 425;

note, 55; see also 1 Atk. 262, note.

(*d*) *Randall v. Mumford*, 18 Ves. 427, *per* Lord Eldon; and see the note 59 to that case, p. 428.

be made that the injunction be dissolved, unless assignees are appointed, and file a supplemental bill within a limited time(e).

25. It may here be observed, that if an *ex parte* injunction to stay proceedings at law, has been improperly obtained, the Court will not go beyond dissolving it with costs, unless there has been, not merely a mistatement of circumstances in the application for it, but that species and extent of mistatement which would operate on the mind of the Court to induce it to make the order. Thus in a late case, the bill prayed an injunction to stay an ejectment, stating that the plaintiffs in equity had no defence at law, and was supported by an affidavit verifying that statement, and on this an *ex parte* injunction was granted; it appeared afterwards that there were misrepresentations in the affidavits, on which the plaintiff obtained his injunction, but they were misrepresentations as to facts, either not within the jurisdiction of the Court, or such as would not affect its decision(f). On this state of things, Lord Cottingham held, that though it was proper to dissolve the injunction, a further order, by which the plaintiffs in equity were directed to give judgment in the ejectment, was irregular.

26. I. The universal practice as to dissolving or not reviving an injunction is, if the answer denies all the circumstances on which the equity is founded, to give credit to it. And except in a few excepted cases, though five hundred affidavits were filed, not only by the plaintiff but by many witnesses, not one could be received for the purpose of *contradicting* the answer. Therefore where an injunction obtained on a bill filed to set aside an award had been dissolved on the coming in of the answer, which denied all the circumstances of the bill, and the plaintiff

(e) *Caird v. Campbell*, 1 Mol. 484; (f) *Brown v. Newall*, 3 My. & C. 558.
see also on this 1 Dan. Pract. 78, and 3 Dan. Pract. 287.

moved to revive the injunction, on the ground that the grand jury had found a true bill on an indictment for perjury on that very answer; Lord Eldon said, the difficulty as to the principle was, that the grand jury might have believed, and in most cases must have believed, those very persons on their oaths, whose depositions could not be received in equity for the purpose of discrediting the answer; and it was therefore a circuitous way of destroying the rule of equity to give credit to the answer; and the motion to revive was refused (*g*).

II. But though no affidavits can be read to *contradict* the answer, they may to substantiate written instruments alleged by the bill, and neither admitted nor denied by the answer. Thus, where for cause against dissolving, the plaintiff relied principally on letters set forth in the bill, and neither admitted nor denied by the answer, the plaintiff was permitted to verify them by the affidavits, and to read them against the defendant (*h*).

III. It seems to have been formerly the practice to allow affidavits to be read in support of allegations made by the bill as to *acts* of the parties, neither admitted nor denied by the answer (*i*); but the decision in the case already cited (*h*) is against this, and in a later case, the same learned judge, who decided *Taggart v. Hewlett*, laid down the rule thus: that if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, then they may be verified by affidavit. But as to facts and circumstances which the defendants do not know of, if the benefit of them cannot be had from the defendant's consciences, it cannot be had at all, except so far as the plaintiff in equity may be able to prove them at the trial (*l*). Lastly, in a very late case, where, upon showing merits confessed in the answer, as cause against dissolving an injunction, the counsel for the plaintiff tendered an affidavit

(*g*) *Clapham v. White*, 8 Ves. 35.

(*k*) *Taggart v. Hewlett*, 1 Mer.

(*h*) *Taggart v. Hewlett*, 1 Mer. 499.

(*i*) *Morgan v. Goode*, 3 Mer. 10.

(*l*) *Barrett v. Tickell*, Jac. 124, 129.

to substantiate certain allegations in the bill as to which the defendant stated in his answer that he was ignorant; the Vice-Chancellor refused to receive it, saying that the point was quite settled (*m*).

IV. It is to be observed also, that where an instrument is neither admitted nor denied in the answer, it is necessary, in order to sustain an injunction, for the plaintiff to prove the existence of it, if it be material, by affidavit. But the rule and practice seem otherwise as to the personal title of the plaintiff. In regard to that, although if the answer denies the title of the plaintiff, no affidavit can be read to repel that denial, yet if the answer neither denies nor admits it, and the plaintiff is in actual possession, that is sufficient evidence of his title. Thus, where the plaintiff, being in possession, claimed as tenant in tail under a settlement made on the marriage of his father, and a mortgagee of a term brought ejectment, the plaintiff filed a bill to restrain the action, on the ground of notice, and obtained the common injunction, and on showing cause against dissolving it, proved by affidavit the execution of the settlement, and that the estate tail was not barred, but did not so prove the marriage of his parents; the Vice-Chancellor thought proof of the latter circumstance unnecessary, as the plaintiff's being in possession was sufficient evidence of title for the purpose of an injunction. The point, however, was not decided, as his Honor said he would permit the plaintiff, if necessary, to file an affidavit (*n*).

V. Where a motion for an injunction to stay proceedings at law is made on the merits appearing by the answer, the answer is evidence for the defendant as to those facts only to which other testimony could be received. But where the equity of the plaintiff is founded on a written agreement, if the answer admits the agreement, it can have no weight as evidence to show that the intention of the parties was otherwise than as appears in the agreement,

(*m*) *Castellain v. Blumenthal*, 3
Dan. Pract. 290; 5 Jurist, 501; and

(*n*) *Hodgson v. Dean*, 2 Sim. &
Stu. 221.

10 Law Journ. 223.

because other evidence could not be received to contradict a written agreement(o).

27. Where a plaintiff claiming as purchaser has obtained an injunction to restrain the vendor from proceeding on a verdict in ejectment, the injunction will not be dissolved on affidavits of trifling waste, denied by affidavits on the part of the plaintiff. Though *semble*, that if a special case was made, as if there was a mine, and the purchaser was proceeding to ruin it, the Court might interfere (p).

SECTION II.

Of dissolving Special Injunctions (a).

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| <ol style="list-style-type: none"> 1. <i>Course for dissolving a Special Injunction.</i> 2. <i>General Rule as to reading Affidavits against the Answer.</i> 3. <i>Distinction on this Point between Injunctions against Proceedings at Law, and Injunctions against Waste, &c.</i> 4. <i>Present rule in Cases of Waste, and Cases analogous to Waste.</i> 5. <i>Distinction where the Plaintiff is moving on the Answer to obtain an</i> | <ol style="list-style-type: none"> <i>Injunction; and where the Defendant moves on the Answer to dissolve an Injunction.</i> 6. <i>The rule that Affidavits are not received against the Answer, applies only when it is a full Answer.</i> 7. <i>Rule as to Time of filing Affidavits, when a Motion to dissolve stands over at the Plaintiff's instance.</i> 8. <i>Where there are several Defendants, and some only answer, Affidavits may be received against those Answers.</i> |
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1. A SPECIAL injunction can only be dissolved upon the merits, and never on such grounds as insufficiency of the

(o) *Bott v. Birch*, 4 Mad. 255.

(p) *Price v. Williams*, 1 Ves. jun. 401.

(a) The observations in this chapter must be considered more particularly with reference to special injunctions obtained *ex parte*; for as those special injunctions which are moved

for upon notice, are granted, if at all, on the merits shown on both sides, they are generally not disturbed till the hearing. A motion to dissolve could, in such cases, be rarely any thing more than in effect a rehearing of the original motion.

answer; for if the answer is insufficient, or otherwise inadmissible as an answer, it is treated as an affidavit (*a*). And it is not necessary, in order to dissolve a special injunction, to obtain first an order *nisi* on the coming in of the answer; but the order to dissolve may be moved for at once upon the answer (*b*). Or the defendant may move to dissolve before answer, upon affidavits (*c*). The application of this distinction between dissolving the special and the common injunction, depends in practice on the circumstance, that the former is “till answer *or* further order,” a form which, as we have seen (*d*), appears to have been adopted for the express purpose of allowing a motion to be made to dissolve before answer.

2. On the subject of reading affidavits, in opposition to a motion to dissolve a special injunction, there has been formerly considerable conflict of decision.

We have seen that, for the purpose of opposing a motion to dissolve the common injunction, affidavits are never allowed to be read to *contradict* the answer. And the rule is broadly laid down in one of the cases referred to (*e*), as applying to dissolving an injunction generally, without specifically distinguishing the common injunction from the special injunction.

3. A distinction was, however, adopted at a very early period, with regard to injunctions for restraining certain wrongful acts of a special nature, as distinguished from the common injunction for staying proceedings at law.

In a case before Lord Talbot, C., where the plaintiff, claiming as patentee of a book of designs, obtained an in-

(*a*) *Smith v. Cleasby*, 10 Sim. 91; 476; *Earnshaw v. Thornhill*, 18 Ves. 488; *Taylor v. Waistall*, cited 1 Newl. Pract. 353.
see *Kershaw v. Matthews*, 1 Russ. 361, and 19 Ves. 351.

(*b*) *Strathmore v. Bowes*, 1 Cox, 263. (*d*) *Ante*, p. 371; and see Eden on Injunctions, 325.

(*c*) *Vipan v. Mortlocke*, 2 Mer. (*e*) *Clapham v. White*, 8 Ves. 35.

junction to restrain piracy of it, affidavits were allowed to be read in opposition to the answer, on a motion to dissolve (*f*). This case was followed by *Ryder v. Bentham*, and *Attorney-General v. Bentham* (*g*).

4. And it may be stated to be, at the present day, the settled practice of the Court to permit affidavits to be read at certain stages of the proceedings against the answer in cases of *waste*, and of *injuries in the nature of waste* (*h*).

But there is this distinction to be observed in cases of waste, that affidavits may be read against the answer in cases of waste, and of acts of a like nature, as to the *acts of waste*, but not as to *title* (*i*). And in *Norway v. Rowe*, in which the plaintiff charged the defendant as a trustee for himself and others as joint adventurers in a mine, with improper working of the mine; it was held that affidavits filed with the bill might be read against the answer, *as to acts of exclusion and mismanagement*, but that no affidavits, whether those filed after the answer, or those filed with and in support of the bill, could be heard as to *title*. The title must be taken from the answer (*j*).

The ground of permitting affidavits on the part of the plaintiff to be read against the defendant's answer, in cases of waste, is, that the mischief is irreparable; the timber, if cut, cannot be set up again; or in other words that the mischief, if permitted, cannot be retrieved. But this reason does not apply of necessity to a case where the damage can be compensated by money; as, for instance, to cases of negotiating bills of exchange improperly obtained or held. And therefore where an injunction has been obtained to restrain the negotiation of such a bill, it must be sustained or dissolved on the merits disclosed by the answer only (*k*).

(*f*) *Gibbs v. Cole*, 3 P. Will. 255.

(*g*) *Ibid.* note; see also the reasons and cases mentioned in *Strathmore v. Bowes*, Dick. 673.

(*h*) See 3 Dan. Pract. 356, and the cases there cited.

(*i*) 19 Ves. 146, 153.

(*j*) 19 Ves. 143, and see 157.

(*k*) *Berkeley v. Brymer*, 9 Ves. 355.

In the case referred to, the decision in *Isaac v. Humpage* (*l*) was relied on, but Lord Eldon said he did not think that, as a judge, he could have supported that case, and it is clear that it is of no authority (*m*).

5. And it is further to be observed, as to reading affidavits against the answer, that if a plaintiff moves, after the defendant has answered, for an injunction to stay waste, or injuries analogous to waste, he will not be allowed to read on any point affidavits filed *after* the answer, in opposition to it (*n*). And this has been also determined in the Court of Exchequer, where it was held in a case of one partner acting in opposition to the articles of partnership, and no case made of irreparable danger, that an affidavit, filed after the answer and contradicting it, could not be heard (*o*). But in cases of waste, if the injunction has been obtained, then on a motion to dissolve it, the plaintiff is not precluded from reading affidavits as to acts of waste against the answer, even although filed after it (*p*). In *Shirreff v. Barnard*, which was a motion to dissolve an injunction against waste, obtained *ex parte* (*q*), the Vice-Chancellor said, "If a bill is filed for an injunction to restrain the commission of waste, and the defendant by his answer denies the acts of waste, it is competent to the plaintiff to show, *by affidavits filed after* the answer, that the denial is false." Time will, however, be given to the defendant to file counter affidavits (*r*).

(*l*) 1 Ves. 427.

(*m*) *Vide* 7 Ves. 308, and the cases in 1 Ves. 431, note 7, and 1 Swansl. 254, note.

(*n*) *Smythe v. Smythe*, 1 Swans. 252, and see the learned reporter's valuable note, p. 254; *Beatty v. Beatty*, 2 Mol. 541.

(*o*) *Lawson v. Morgan*, 1 Pri. 303.

(*p*) *Brydges v. Stephens*, 6 Mad. 279; *Shirreff v. Barnard*, 8 Sim.

165; and see *Strathmore v. Bowes*, 1 Cox, 263, and the observations of Lord Eldon, 1 Swans. 253, 254. The report of *Brydges v. Stephens* is not quite clear on the point under consideration; but it is presumed that the affidavits tendered in that case, must have been filed after the answer.

(*q*) 8 Sim. 166.

(*r*) *Brydges v. Stephens*, 6 Mad. 279.

But even on a motion to dissolve an injunction against waste, affidavits filed after the answer, although going only to deny *facts* alleged in the answer, will be rejected if those facts indirectly affect the title. Thus where the plaintiff, the lessor, claimed, as annexed to the freehold, certain sheds in a ship-builder's yard, and the answer swore that they were not let into the soil, but merely stood on it; the plaintiff tendered affidavits to prove that the sheds were let into the soil; but Sir L. Shadwell, V. C., said the case was so constituted that a matter of fact became a matter of title, and refused to permit the affidavits to be read (s).

6. And it is to be observed that when it is said that affidavits cannot be read against the answer, it must be understood against a full answer; therefore, where a plaintiff having obtained an *ex parte* injunction, the defendant, on putting in his answer, gave notice of motion to dissolve; and then the plaintiff excepted, and the defendant submitted and put in a further answer; it was held, that on a motion to dissolve, made upon the notice so given, the plaintiff might read affidavits filed after the exceptions taken, and before the coming in of the further answer, on this ground; that the defendant, by submitting to answer further at once, admitted that he knew his first answer was insufficient, and the Court therefore treated it as an affidavit. But if the defendant had, after putting in a further and sufficient answer, served a second notice of motion, then further affidavits against the answer could not have been read (t).

7. And it must also be observed that a rule has been lately laid down, that where notice of motion is given to dissolve an *ex parte* injunction, and on the motion being mentioned, it is ordered to stand over at the plaintiff's request, no affidavits can be read at the hearing of the mo-

(s) *Shirreff v. Barnard*, 8 Sim. 161.

(t) *Smith v. Cleasby*, 10 Sim. 91.

tion which were not filed at least before ten o'clock on the day for which the notice was given (*u*). And a special injunction will be discharged with costs, if at the time of applying for it, office copies of the affidavits on which it was granted were not obtained (*x*).

8. Where there are several defendants and some only have answered, it has been decided that on a motion for a receiver, the answers of those defendants who have answered can be treated, in the absence of the answers of other material defendants who have not, only as affidavits, and consequently the plaintiff is entitled to read affidavits against them (*y*). And the same rule has been applied where a special injunction having been obtained against several defendants copartners, three of whom had answered, but the fourth had not, the three who had answered moved to dissolve the injunction; his Honor the Vice-Chancellor treated it as a joint injunction, and therefore held that the plaintiff was entitled to read affidavits against the answers (*z*).

(*u*) *Anon.* 10 Sim. 50.

(*x*) *Ibid.* 326.

(*y*) *Kershaw v. Mathews*, 1 Russ. 361.

(*z*) *Naylor v. Wellington*, 8 Sim. 396.

SUPPLEMENT

TO THE

TREATISE ON INJUNCTIONS.

PART I.

OF STAYING PROCEEDINGS AT LAW AND IN OTHER COURTS.

CHAPTER I.

Of Injunctions to stay Proceedings at Law where the Legal Title of the Defendant in Equity is founded originally on some inequitable Transaction ; or is against Public Policy ; or where, although the Legal Title of the Defendant in Equity may not have been originally inequitable, it has been tainted with Fraud, actual or constructive, by the subsequent Conduct of the Party claiming under it.

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| <ol style="list-style-type: none">1. Jurisdiction to restrain Proceedings at Law on Instruments obtained by Fraud.2. Gambling Transactions.3. As to the Interference of Equity when the Illegality of the Instrument appears on the Face of it ; or where its Validity can be tried at once at Law.4. Of restraining Proceedings on Instruments obtained under undue Influence or Intoxication.5. Frauds on Compositions with Creditors. | <ol style="list-style-type: none">6. When Equity will, and when it will not interfere between Parties to a Contract against public Policy.7. When Persons by fraudulent Acquiescence in permitting others to deal with their Rights as their own, lose their Equity.8. As to the Interference of Equity to prevent a Party from proceeding against another under the Bankruptcy or Insolvency Acts.9. Of the Effect on the Liability of Sureties of giving Time or other Advantage to the principal Debtor. |
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1. **WHERE** a young man, an officer in the army, who had very recently attained his majority, became liable, upon

bills of exchange, for the accommodation of his superior officer, to the defendant, a money lender by profession, and upon negotiations for getting in the bills, the defendant agreed to postpone the payment of them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory note; the Court, not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities (*a*).

In a recent case an attempt was made to contend that the Court could not restrain the East India Company from paying money due on East India bonds, to a person alleged to have obtained fraudulent possession of them; on the ground, first, that such bonds pass by delivery, and are payable to the holder like bank notes; secondly, that the interference of the Court would tend to depreciate the East India Company's securities; but the Court held that it had jurisdiction as incident to its inherent jurisdiction in all cases of fraud (*b*), unless expressly restricted by the legislature; and that by the East India Company's Act, 51 Geo. 3, c. 64, s. 4, the Court was not so restricted.

2. Where money has been lent in a foreign country, to be used in gaming in such country, and there is nothing to show that the games were illegal according to the law of the country in which they were played, equity will not restrain an action to recover the debt (*c*).

3 (*d*). On similar grounds to those on which *Gray v. Matthias* (*e*) and cases of that class were decided, Lord Langdale, M. R., dismissed a bill which sought a declaration that a lease granted by the plaintiffs was invalid, and

(*a*) *Lloyd v. Clark*, 6 Beav. 309;
and see p. 3 of the Treatise

(*b*) *Glass v. Marshall*, 15 Sim. 71.

(*c*) *Quarrier v. Colston*, 1 Phil. 147.

(*d*) See p. 11 of the Treatise.

(*e*) 5 Ves. 286.

to have a reconveyance and the lease delivered up. His Lordship held the lease absolutely void, and therefore that the plaintiffs might recover in ejectment, and did not want a reconveyance; and although the lease was not invalid upon the face of it, and would therefore be a document which the plaintiffs would be entitled to have delivered up, if they could not try its validity at law, yet as they were in a position to have its validity tried at once, the Court held that the bill could not be sustained as a bill to have the void lease delivered up (*f*).

4. In a case where persons of mature age, dealing with A., took from his niece, B., a guarantee for money due to them from A., with knowledge that A. had been B.'s guardian; that B. had but recently attained her majority, and that she then lived with and under the protection of A. and his family; the Court granted an injunction restraining an action against B. for the money for which she had given her guarantee (*g*).

With respect to the effect of instruments executed while in a state of intoxication, the doctrine of *Johnson v. Medlicott* (*h*) and *Cooke v. Clayworth* (*i*) has received some qualification from the very recent case at law of *Gore v. Gibson* (*k*), in which it was decided that it is only partial intoxication which does not relieve a man against his contract, but that if the drunkenness is so complete that a man is incapable of knowing what he is about, and the party contracting with him is cognizant of his state, he shall not enforce the contract of the drunken man against him.

5. On this point, see also *Spurret v. Spiller* (*l*) and *Lee v. Lockhart* (*m*).

(*f*) *Corporation of Arundel v. Holmes*, 4 Beav. 325; see also *Smyth v. Griffin*, 7 Jurist, 101.

(*g*) *Maitland v. Irving*, 15 Sim. 437; and see p. 18 of the Treatise.

(*h*) 3 P. Wms. 130, note A.

(*i*) 18 Ves. 12; and see Treatise, p. 20.

(*k*) 9 Jurist, 140.

(*l*) 1 Atk. 105.

(*m*) 3 Myl. & Cr. 302; and see p. 21 of the Treatise.

6(*n*). The judgment in the case of *Barnard v. Sutton* (*o*) contains important observations on the question when equity will and when it will not interfere between parties to a contract against public policy. The case was decided on other grounds.

7(*p*). In a very recent case, on a motion to restrain the defendant in equity from proceeding in an ejectment, the plaintiff in equity was proprietor of a colliery, and the defendant was perpetual curate of some land through which the plaintiff desired to make a railway. The plaintiff, acting under the compulsory powers of an act of parliament, after giving due notice to the defendant, had taken possession of his land, and constructed the railway through it, the defendant neither assenting nor dissenting. Afterwards disputes arose about the compensation, and then the defendant brought an action of ejectment; on a motion to stay the proceedings, the defence made by the answer was, that the defendant had not opposed the construction of the railway, because he thought he should not continue to be the incumbent after a given time, and because he thought the plaintiff had the power to proceed under the act. The Court treated the case as one of acquiescence, and stayed the ejectment, putting the plaintiff on terms to give judgment in the action to be dealt with as the Court should direct, and to pay into Court a sufficient sum to be a security to the defendant for the price of the land (*q*). On the same principle of acquiescence, a party may, by acquiescing in the creation of a nuisance, deprive himself of his right to sue at law for damages on account of the nuisance. This was decided in two old cases (*r*), and to the same effect is *Williams v. Earl of Jersey* (*s*). And it is clear that if a person in possession of land,

(*n*) See p. 22 of the Treatise.

(*o*) 7 Jurist, 685.

(*p*) See p. 35 of the Treatise.

(*q*) *Powell v. Thomas*, 6 Hare, 300.

(*r*) Case of the watercourse; and

Short v. Tayler, 2 Eq. Cas. abridged, 522.

(*s*) 1 Cr. & Phil. 91.

knowing that another claims it, the claim of that person having been of course distinctly made, will, with his eyes open, lay out money upon the land, he will not be aided by injunction to keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made (*t*).

An important distinction exists between the effect of acquiescence as a ground of demurrer to a bill for an injunction, and as a ground for resisting merely the injunction. In the first instance, the acquiescence must be such as wholly to disentitle the plaintiff to any relief; in the second, acquiescence falling short of that degree may be a sufficient defence (*u*).

The case referred to turned upon two points: first, whether certain buildings erected and used by a company for the purpose only of housing and repairing their engines and carriages, and not as a station, in the ordinary sense of the word, constituted *public* buildings, &c. within the meaning of the act under which the company acted; and, secondly, whether the acquiescence of the plaintiff had been such as to preclude him from obtaining an injunction. It appeared that he had continually objected to the proceedings of the company, though he had taken no proceedings so long as he was led by them to believe that such proceedings were merely temporary; but on their asserting a right to do the acts objected to, the plaintiff filed his bill without any further delay. On both points Lord Langdale, M. R., thought the plaintiff entitled to an injunction. Afterwards an appeal motion was heard by the Lord Chancellor, who directed the opinion of a court of law to be taken on the construction of the act. The report does not state whether his Lordship continued the injunction in the meantime.

8(x). The jurisdiction to prevent a party from proceed-

(*t*) *Master of Clare Hall v. Harding*, 6 Hare, 273.

way Company, 5 Beav. 229.

(*x*) See p. 40 of the Treatise.

(*u*) *Gordon v. The Cheltenham Rail-*

ing against another, under the Bankruptcy or Insolvency Acts, has been exercised under particular circumstances(*y*). But where there are no equitable circumstances to prevent a party from exercising his common law right of proceeding against another under the Insolvent Debtors' Act, he will not be restrained from proceeding to obtain a vesting order(*z*).

9. An injunction will not be granted to restrain an action against a surety, because the obligee, after having commenced an action against the principal, takes from him without the obligor's privity a *cognovit*, with a stipulation that judgment shall not be entered up nor execution issued till a given day, that day being earlier than it would have been possible to obtain judgment in the action. The Court said, by the arrangement complained of, time was not given, but the remedy was accelerated (*a*).

(*y*) *Attwood v. Banks*, 2 Beav. 192.

Coll. C. C. 672; S. C. 6 Jurist, 846.

(*z*) *Anon.* Rolls, 8 Jurist, 1085.

(*a*) *Hulme v. Coles*, 2 Sim. 12.

See also *Perry v. Walker*, 1 You. &

CHAPTER II.

Of Injunctions to stay Proceedings at Law where the Plaintiff in Equity has some equitable Right to set up against the Plaintiff at Law, of which the Court of Law cannot, either by reason of Want of Jurisdiction, or by reason of its Forms of Proceeding, take cognizance; or where the Legal Right of the Plaintiff at Law is coupled with, and abridged by, some Equitable Liability.

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| <p>1. <i>Injunctions in Cases of Mistake (a).</i></p> <p>2. <i>Injunctions where the Defendant at Law has good Matter of Defence, but cannot use it by reason of the Forms of Proceeding; or where proceedings in Equity, in which Justice can be done, have been instituted.</i></p> | <p>3. <i>Of the Right of a Mortgagee to proceed on his several Remedies at once.</i></p> <p>4. <i>Where the final Claims of the Parties can only be ascertained by a complicated Account.</i></p> |
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1. **IT** must not be assumed that against every mistake of fact, equity will relieve. Where mistake is in reality only another name for neglect in a party to use those means of information which are open to him, he is bound by his act, although it be a mistake of fact. Thus, where exchanges of lands being in progress under the 6 & 7 Will. IV. c. 115 and 3 & 4 Vict. c. 31, B. executed to the commissioner a written consent under the act to exchange certain lands for others belonging to N., for which it was clear he had not intended to exchange them, but B. had the means of knowing that the lands which he consented to take were not such lands as he intended to consent to take; the House of Lords sustained an injunction restraining B. from proceeding against N., the exchangee, in ejectment, and refused an injunction to restrain the commissioner from

(a) See p. 48 of the Treatise.

executing his award, and to restrain N. from committing waste on the lands of B. allotted to him (*b*).

In a very recent case an attempt was made to obtain an injunction where the plaintiffs had paid money into court under a mistake as to the legal consequences of such act, and the effect of it was to give certain defendants a legal title to take the money out; but the Court refused to restrain the defendants from so doing, on the ground that a mistake as to the legal consequences of an act did not call for the interference of equity (*c*).

2 (*d*). Where the purchaser of premises from the sheriff, under a sale in pursuance of an execution, obtained possession, but no assignment, so that he had not the legal title, and the question between him and the defendant was whether the sale was regular or not, a question which would not be at all tried in ejectment, the defendant in equity was restrained from proceeding in ejectment against the purchaser of the premises; and liberty was given to the latter to take such proceedings at law as he might be advised, to try the legality of the sale, and to perfect his title at law (*e*). So where the allegation of the bill and affidavits were, that A. being indebted to B., B. in his lifetime desired A. not to return the money, but to hold it for C., and that B. never in his lifetime called upon A. to pay him, and after B.'s death his executor brought an action against A. for the debt, an injunction was granted to restrain the action at the suit of the alleged cestui que trust, the money being brought into court, on the ground that the real question, which was whether a trust was created by B. in favor of C., could not be tried in the action (*f*).

Both these cases proceed on the principle, that equity

(*b*) *Duke of Beaufort v. Neeld*, D. P., 12 Clark & Fin. 243; S. C. 9 Jurist, 813.

(*c*) *The Great Western Railway Company v. Cripps*, 5 Hare, 91.

(*d*) See p. 63 of the Treatise.

(*e*) *Jones v. Hughes*, 1 Hare, 383.

(*f*) *M'Fadden v. Jenkins*, 1 Hare,

458.

will not suffer proceedings at law where there is some equitable claim set up by the plaintiff in equity, which, owing to the forms of legal proceedings generally, or of the particular legal proceedings, cannot properly be tried in them. The following case is referrible to a different principle, viz. that equity will not suffer proceedings to be taken at law where proceedings, in which full justice could be done, have already been taken in equity.

In the case referred to, an estate had been the subject of an administration suit, and had been fully administered, the executor having every opportunity of examining every charge upon the estate and every particular constituting it; he was, on that ground, restrained from continuing actions brought without the leave of the court, against persons parties to the suit, to recover property belonging to the testator (*g*). But care must be taken not to confound with cases of this sort, cases where, although A. may have not only a legal right but an equity as against B., he has a purely legal right or none at all against B.'s creditor. Thus, where A. had let to B. a furnished house, and C., a judgment creditor of A., caused the sheriff to seize the furniture comprised in the lease, the Court refused an injunction, on the ground, that if B. had any title against C. it was legal, and his remedy was at law (*h*). And in a recent case, where the plaintiffs, farmers, had agreed with their father for the use of a barn and yard on his premises, wherein to put their carts and farming implements; and the defendant, a judgment creditor of the father, seized in such barn and yard goods of the plaintiffs as well as of their father; the Court refused an injunction to restrain the sheriff from selling, on the ground, that as no trust was made out, the Court would not interfere (*i*). And here it may be observed, that as equity will of course not interfere where the plaintiff in equity has a good defence at law, so where there are several answers by the defend-

(*g*) *Oldfield v. Cobbett*, 6 Beav. 515.

(*i*) *Jackson v. Stanhope*, 10 Jurist,

(*h*) *Garstin v. Asplin*, 1 Mad. 150. 676.

ant at law to the claim of the plaintiff at law, and one only is an equitable answer and the others are, if good defences, purely legal, equity will not stay the proceedings at law ; because to do so, would tie up the plaintiff at law from proceeding till the cause is heard in equity, and then if the plaintiff in equity is wrong in his equity, the plaintiff at law is still to seek his remedy ; and because if the defendant at law succeeds there, there is no question for equity to adjudicate upon (*k*).

3 (*l*). In a late case an attempt was made to deny the right of a mortgagee to sue on his covenant, at the same time proceeding to sell under his power of sale ; on the ground that the price agreed to be paid by the purchaser exceeded the mortgage debt, the bill impeaching at the same time the sale. The Court refused to restrain the mortgagee, treating the case as plain (*m*).

4 (*n*). In ascertaining whether a bill in equity is the proper course, where the defendant would have a title at law to set up some demand, care must be taken to distinguish whether there is *equitable set-off*, which is, where the equity of the bill impeaches the very demand of the plaintiff at law, as in *O'Connor v. Spaight* (*o*) ; or whether there are specific cross demands, as in the case of *Whyte v. O'Brien* (*p*). For where the case is simply one of specific cross demands, as where the plaintiff at law sues upon a clear breach of a contract, and the plaintiff in equity files a bill to restrain the action, on the ground of a complicated account between the parties in reference to dealings arising out of the contract ultra the particular breach, equity will not stay execution of a judgment obtained by the plaintiff at law until the account is settled. The equity, it would seem, must be, not that if the defendant at law pays the demand

(*k*) *Barnard v. Wallis*, 1 Cr. & Sm. 392
Phil. 85.

(*l*) See p. 68 of the Treatise.

(*m*) *Willes v. Levett*, 1 De Gex &

(*n*) See p. 74 of the Treatise.

(*o*) 1 Scho. & Lef. 305.

(*p*) 1 Sim. & Stu. 551.

of the plaintiff at law, it may turn out that upon setting that off against the balance due from him on the general account, he will have had too much, but that the very substance of his demand at law is cut down by something which cannot be ascertained until the general account is taken. The subject is fully discussed in the elaborate judgment of Lord Cottenham in *Rawson v. Samuel* (q), in which his Lordship has reviewed the authorities and clearly defined the principle of the jurisdiction to interfere on the ground of cross demands.

It was held in a case of *Morris v. Day* (r), that mere complexity of account, even where there are cross demands, will not induce a court of equity to restrain an action; not on the ground of want of jurisdiction, for the Court said, if the bill had been filed first, it would have stayed an action, but on the ground that the account might be as well investigated by arbitration as by the Master; and still less will mere complexity afford ground for staying an action, where the account is entirely one-sided (s). It may be doubted, however, whether the general doctrine of *Morris v. Day* can be supported consistently with the very recent decision of the House of Lords in *The Taff Railway Company v. Nixon* (t). In that case a contract had originally been made between Nixon and the Railway Company: by that contract Nixon was to do certain works for a specified sum, subject to certain deductions or increases, with a provision for payment of extra work at prices specified. Nixon had advances of money from Storm, and to secure him, assigned to him the payments he Nixon was to receive under the contract. Afterwards, to secure Storm further, a new contract was entered into, to which Nixon, Storm and the company were parties; and the effect of that contract was, that the two became joint contractors with the company for the works which were to be per-

(q) *Rawson v. Samuel*, 1 C. & Phil. 161. See also *Clark v. Cort*, 1 C. & Phil. 154.

(r) 4 Y. & Coll. Exch. 475.

(s) *South-Eastern Railway Company v. Martin*, 12 Jurist, 1062.

(t) 1 Cl. & Fin., House of Lords Ca. 111.

formed under the contract originally entered into by Nixon alone. Under this contract the works were done, and in addition to the works jointly done, Storm executed works independently of Nixon for the company—all the money transactions were with Storm. The result of all this was, that there was an account between Storm and Nixon and the company on account of the joint contract; and there was also an account of the payments due under the original contract. The company paid all the monies generally, and by their answer said they were unable to say to which of the accounts particular payments were to be referred. In this state of things, with a complicated account between Nixon and the company, and as between Nixon, Storm and the company, the necessity of ascertaining to which contract and to which works the payments made were to be referred, Nixon filed his bill against the company and against Storm's assignees (Storm having become bankrupt) for an account of what was due from the company in respect of the original contract, and for an account as between himself and Storm's assignees. The question was whether such cross demands were proper for a court of law only, or whether the account ought to be taken in equity; and the House of Lords decided upon the principle laid down in *O'Connor v. Spaight* (cited *supra*), that it was fit that it should be taken in equity.

It will not be forgotten that the rule in *O'Connor v. Spaight* is, that an account is only proper to be taken in equity where there are cross demands, in cases where it can only appear from the result of a general account what is due to the party who would be plaintiff at law, and when such account is too complicated to be examined on a trial at nisi prius. And it will be observed, that this is the distinction between such cases as *The Taff Railway Company v. Nixon* and *Rawson v. Samuel* (u).

From the very nature of this sort of case, it will always

(u) See also on the principle of *way Company v. Martin*, 13 Jurist, 1. this jurisdiction, *South-Eastern Rail-*

be of course a matter of great difficulty to determine within which class of authorities a particular case falls. But I apprehend that the cases above referred to warrant these general conclusions as to the *principle* that must be kept in view in considering such cases.

- I. That equity will not interfere where there is a specific demand on the one side, merely because in a general account between the parties, it may turn out that the party making the specific demand will have received under it more than he can set off against it.
- II. That to support the interference of equity, an account must be requisite before the specific demand at law can be ascertained, and that account must be so complicated as to be unfit for a jury.
- III. That if the account can be taken by a jury, equity will not interfere, even though it may be necessary that the account should be taken before the demand can be ascertained; in other words, to induce equity to interfere, there must be both *equitable* set-off, within the doctrine of *Rawson v. Samuel*, and such complexity in the account that a jury could not take it.

CHAPTER III.

Where Relief is sought against Forfeiture or Penalties incurred by the Breach of Covenants or the Neglect of other legal Liabilities.

ON the question of relief against breach of covenants in leases, see *Algar v. Murrell* (a), in addition to the cases referred to on this point in the Treatise (b).

(a) Vide 6 Jurist, 775.

(b) Page 80 *et seq.*

CHAP. IV.

Of the Jurisdiction in general.

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| 1. Jurisdiction to stay Proceedings generally in any Foreign Court (a).
2. On restraining Proceedings in the same Court when the Suits are not precisely for the same Matter.
3. On restraining Proceedings in other Courts on the mere ground of the Court having drawn the Matter within its own Jurisdiction. | 4. As to staying Proceedings in Creditors' suits.
I. Generally.
II. As to the Costs which the Creditor will be entitled to.
III. As to staying Proceedings at Law by a Creditor.
5. On restraining Proceedings against the Officers of the Court. |
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1. THE Court of Chancery has refused to grant an injunction to stay assignees in bankruptcy from proceeding in the bankruptcy, by making a dividend or otherwise, when the plaintiff's only claim was as a general creditor (b). "My opinion is," said the Vice-Chancellor of England, "that this Court has no jurisdiction simpliciter to restrain the assignees from making a dividend of that which is admitted to be the estate of the bankrupt. . . . If the question had been whether any assets, any personal estate, or any species of property which was in the hands of the assignees as part of the bankrupt's separate estate, was in fact the property of the plaintiff, this Court would, I apprehend, decide the question, because the jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate, but has no power to determine what is the bankrupt's estate. If the question is a legal one, it must be tried at law; and if it be an equitable one, it must be decided in equity. But where you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in Bankruptcy (c)."

(a) See as to *Duncan v. M'Almont*, cited in the Treatise, p. 98, 3 Beav. 306.

(b) *Halford v. Gillow*, 14 Sim. 44.

(c) *Halford v. Gillow*, 14 Sim. 49.

There is always considerable difficulty in distinguishing between absence of jurisdiction, and the refusal to exercise it; but it may be thought that, looking at the cases already cited on the question of jurisdiction (*d*); looking at the well settled doctrine that the Court by granting an injunction, does not assume jurisdiction over any other Court, but merely over the persons parties to the suit; this was not a case of absence of jurisdiction, but of refusal, and doubtless well founded refusal, to exercise it; and that the language of the Court is to be read in that sense (*e*).

2. On restraining of proceedings in the same Court, when the suits are not precisely for the same matter (*f*), see *Rigby v. Strangways* (*g*), in addition to the cases cited in the Treatise (*h*).

3. On restraining proceedings in other Courts, on the mere ground of the Court having drawn the matter within its own jurisdiction, see on the same point as in *Sutton v. Mashiter* (*i*), *Oldfield v. Cobbett* (*k*).

Under this head also may be ranged the case of *Stubbs v. Sargon* (*l*), where a purchaser of book debts under the order of the Court, being, as a condition of his purchase, entitled to have delivered to him a particular set of account books, of which he was unable to obtain possession, commenced an action of trover against the vendor. It was held that this proceeding was wholly irregular, and the action was stayed.

4. I. On the principle that the Court will not stop a creditor at law, unless there is a decree under which he can go on, it has been held that where the bill was not on behalf of all creditors, and the decree was only contingently a decree

(*d*) See in the Treatise, pp. 96, 97.

(*e*) See in addition to the cases cited in the Treatise, p. 100, n. (*p*), *Gingel v. Horne*, 9 Sim. 539; *Allen v. M'Pherson*, 1 Phil. 133.

(*f*) See pp. 105, 106 of the Treatise.

(*g*) 2 Phil. 175.

(*h*) See pp. 105, 106.

(*i*) 2 Sim. 513.

(*k*) 6 Beav. 515.

(*l*) 4 Beav. 90.

for their common benefit, a creditor could not be restrained from proceeding at law (*m*).

In considering the protection given to an executor against creditors at law, it must also be remembered that the executor takes, of course, only that which was the testator's; and that, therefore, if, at the time of the testator's death, a creditor had a lien amounting to a *dominium* over any part of the testator's property, the executor cannot restrain the creditor from exercising his legal right. This point arose in *Rankin v. Harwood* (*n*). In that case the creditor, Kirk, obtained a judgment in December, 1845; and on the 7th April, 1846, a writ of *fi. fa.* was placed in the hands of the proper officer for execution. The debtor died on the 6th April. During the lifetime of the debtor, a mortgagee's bill for an account was filed, and on his death the mortgagee filed a bill of supplement and revivor against the debtor's executor. In the two suits a decree was made in June, 1846. In July, 1846, the sheriff took possession, under the *fi. fa.*, of certain goods of the testator; and the executor immediately moved for an injunction to restrain him from removing or selling such goods, and to restrain the creditor from proceeding in his action. Sir J. Wigram, V. C., refused the motion: he said, if the writ had been put into the hands of the sheriff before the death of the debtor, then, beyond all question, the creditor might have taken them in execution, even in the hands of a purchaser (except in market overt), from the executor. "At the death of the testator," said his Honor, "supposing the writ to have been then in the hands of the sheriff, the creditor had a dominion over the goods paramount to that of the executor; or, in other words, the amount of the assets of the testator over which the executor had dominion, adverse to the creditor's right, was the amount of the gross assets minus the amount of the creditor's claim." Then the writ, when put into the hands of the sheriff, taking effect by re-

(*m*) *Rankin v. Harwood*, 2 Phil. 24.

(*n*) 5 Hare, 215.

lation, as from the teste of the writ, (which was before the testator's death), his Honor held that the creditor could not be enjoined.

II. (o) If the executor shows what are the assets, and the plaintiff at law had notice of the decree before he issued his writ, the plaintiff at law will have no costs of the action or of the motion (p). In *Burnett v. Burnett* (q), under similar circumstances, the injunction was granted, but costs were reserved. In that case, however, the decree specially noticed the debt of the plaintiff at law, and directed the Master to inquire whether any steps should be taken with regard to his claim. The Court expressly guarded itself against laying down any rule by this case.

III. On the question of the distinction between the cases where the judgment at law is *de bonis testatoris*, and where it is *de bonis testatoris, et si non de propriis* (r), some important cases have been decided since the publication of the Treatise. In a very recent case (s), the plaintiff at law was proceeding under a judgment against the testator, in an action against the executors, to recover execution *de bonis testatoris*. The executors pleaded *plene administravit*. The cause was set down, and shortly to be heard. Before it was heard, a decree was made in a creditors' suit, and then the executors moved to stay the action on the same ground as in *Brook v. Skinner* (t), that the executors' plea would be falsified, and then the plaintiff at law would recover *de bonis propriis*. But Sir L. Shadwell, V. C. E., thought that, on the evidence before him, it appeared that the executors had not assets in their hands sufficient for the payment of debts, so that in effect their plea was not a false plea, and therefore his Honor granted the injunc-

(o) See p. 110 of the Treatise.

(r) See p. 113 of the Treatise.

(p) *Jones v. Brain*, 2 Y. & Col.

(s) *Vernon v. Thellusson*, 7 Jurist,

C. C. 170.

503.

(q) 10 Jurist, 4.

(t) 2 Mer. 481, n.

tion. On appeal the Lord Chancellor affirmed the decision, but not merely on the ground assigned by the Vice-Chancellor. His Lordship's reasons were, first, that upon the plea of the executors being falsified, the judgment would not be *de bonis propriis*, but only *de bonis testatoris* (u); the result of which would be, that the assets would be withdrawn from the general fund, which ought to be distributed in equity for the benefit of the whole of the creditors; secondly, that independently of the general question, the plea not having been filed till after the decree had been obtained and notice of it served, it was obvious it had only been filed to enable the executors to apply to this court (x); and, lastly, that the account given of the state of the assets by the executors was satisfactory (y).

In another case, before Lord Lyndhurst, C., the suit was a creditors' suit against the real and personal estate of an intestate. After decree, the heir moved for an injunction to restrain proceedings in an action brought by a bond creditor. The heir had pleaded *riens per descent*, and the motion was opposed on the ground, that if the plaintiff at law falsified this plea, he would be entitled to judgment against the heir *de bonis propriis*. But the Lord Chancellor granted the injunction generally; on the ground that, although if the plea were falsified, the creditor would be entitled to execution against the heir to the value of the lands which he had by descent; yet on paying the amount, the heir would be entitled to hold the land discharged (z); so that the result would be in effect to take the particular creditor's debt out of the real assets of the intestate as much as if execution had been against the assets, and that, his Lordship added, in a case where the decree had priority over the judg-

(u) See, p. 120 of the Treatise, and the authorities there cited.

(y) 1 Phil. 466.

(x) *Fielden v. Fielden*, 1 Sim. & Stu. 255. See Treatise, p. 115.

(z) *Buckley v. Nightingale*, 1 Str. 665.

ment (a). This case is not inconsistent with the principle of *Price v. Evans* (b), so far as it protects the assets of the testator or intestate from being dealt with at law for the particular creditor. But, as regards the relative positions of the creditor and the heir, the effect of Lord Lyndhurst's order would, it is apprehended, be very different from that of the Vice-Chancellor. By the special order made in *Price v. Evans*, the assets of the intestate would be withdrawn from the particular creditor, to be administered in equity. The heir would be left unprotected as to his personal liability at law, which would be measured by the value of the lands come to him by descent; the creditor would therefore be paid. As between the heir and any other creditor proceeding at law, if there were no decree in equity, no doubt the heir would be entitled to hold the intestate's land discharged, to the extent to which he had personally paid the previous debt. But it is quite clear, that by the effect of the decree in equity, the heir would practically lose his right to hold the lands of his intestate discharged, unless the decree were to be mere words without force, because the decree fastens the debts of the other creditors upon the land withdrawn from the action. The effect of Lord Lyndhurst's order in *Rouse v. Jones* would be very different. It would protect the heir against his personal liability at the expense of the particular creditor who sued at law; in other words, it would interfere with that legal right which the heir gave to the plaintiff at law, as against him personally, by setting up a false defence. Whether his Lordship considered that the exercise of such a right in the creditor would be inequitable, if the assets were withdrawn from the claim of the heir to recompense himself out of them: or whether his Lordship overlooked this effect of his order; or whether, not overlooking it, he thought a divided injunction could not be granted, does not appear by the report. Nor does it appear whether this peculiar

(a) *Rouse v. Jones*, 1 Phil. 462.

(b) 4 Sim. 514.

consequence of granting an injunction simpliciter was called to his attention. On the whole it may be doubted whether Lord Lyndhurst meant to do more than was done in *Price v. Evans* and *Kent v. Pickering*, viz. to protect the assets.

The general conclusion (c) on this subject that I submit must now be arrived at is, that if a judgment at law is *de bonis testatoris, et si non de propriis*, the Court will take care by some order to prevent the assets from being withdrawn from the general fund for the payment of creditors; but whether it will do so by restraining the proceedings at law generally, or by a special order protecting the assets only, without prejudice to such rights at law against the representative personally, as the creditor may have, must, in the present state of the authorities, be considered as unsettled.

5. On the same principle as that of the cases referred to in the Treatise (d), where a receiver had been appointed, the Court restrained a company from proceeding without the leave of the Court to summon the trustees of the property before the justices, under the authority of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 85) for assessing the value of the land, preparatory to taking compulsory possession of it (e).

See also, on the subject of restraining the officers of the Court from seeking redress in other Courts, *Ambrose v. Dunmow Union* (f).

(c) See in p. 122 of the Treatise the third conclusion drawn from the then existing authorities.

(d) Page 127 *et seq.*

(e) *Tink v. Rundle*, 10 Beav. 318.

(f) 8 Beav. 43.

PART II.

OF INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

CHAPTER I.

Injunctions against Waste.

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| 1. <i>Of equitable Waste.</i> | |
| 2. <i>Waste as between Mortgagor and Mortgagee.</i> | structive of Property, analogous to Waste. |
| 3. <i>Waste by Ecclesiastical Corporations.</i> | 6. <i>Injunctions to protect a Receiver against Waste.</i> |
| 4. <i>Cases on permissive Waste.</i> | 7. <i>Injunctions against Trespass.</i> |
| 5. <i>Injunctions to restrain Acts de-</i> | 8. <i>The Effect of Laches on the granting of Injunctions against Waste.</i> |

1. IN addition to the cases on this head referred to in the Treatise, may be mentioned the two following cases, *Morris v. Morris* (a) and *Blaggrave v. Blaggrave* (b).

Morris v. Morris decided that ornamental timber will be protected, even though the mansion-house to which it was originally appurtenant has been pulled down, at least if there is any power in the settlement under which by possibility those in remainder may have an interest in preserving the timber. In the case referred to, there was a power in the settlement to demise to persons who should be willing to build houses or to repair houses, and the Court relied upon that to some extent in aid of the right of the remainder-man. The decision, however, seems to have proceeded principally on the broad proposition, that

(a) 15 Sim. 505. See Treatise, p. 144. (b) 1 De Gex & Smale, 252.

if timber has been planted, or intentionally left standing, for ornament, the rule of the Court is to protect it.

In *Blagrove v. Blagrove* there was a singular provision in a will. The limitations were to the testator's wife for life, with several remainders for life, without impeachment of waste, with a proviso that neither the testator's wife nor any other person should mow any part of the park, or feed the same with other cattle except cows, sheep and deer. On an application for an injunction to restrain the tenant for life in possession from mowing, it was objected that the proviso was inconsistent with the estate. The Court granted the injunction, but with great reluctance (c).

It has been seen in the Treatise (d), referring to *Coffin v. Coffin* (e), that an injunction is not granted on the principle that it will do no harm to the defendant if he does not intend to commit the act complained of; nor will an injunction be sustained to prevent the defendant from removing works which it is clear the plaintiff had no right to erect, although it may be equally clear that such works are not injurious to the defendant or to any one else (f). In a subsequent case the same principle was followed. The defendants, a company, had erected certain works of a temporary and innocuous character, but without any power to erect such works. The Court suspended for a limited time an injunction of the negative mandatory class, which would in effect have compelled them to pull down the works, putting the company on an undertaking to do certain things, comprising all those things which their act required them to do for the convenience of the plaintiff (g).

But, on the other hand, if the injury has been committed, the party injured is not bound to accept the personal undertaking of the defendant that he will not continue the

(c) *Blagrove v. Blagrove*, 1 De Gex & Smale, 252.

(d) Page 147.

(e) Jac. 70.

(f) *London and Brighton Railway Company v. Cooper*, 2 Rail. Cas. 312.

(g) *Attorney-General v. Eastern Counties Railway Company*, 3 Rail. Cas. 337.

injury, but is entitled to the protection of an injunction. This was held in a case of *Geary v. Norton* (*h*), in which the defendant had pirated a registered article, and, on being apprised of his fault, and that a bill and affidavit had been prepared, offered to pay the costs already incurred, and to suspend the sale of any of the pirated articles of which he was the holder. The plaintiff, nevertheless, obtained an injunction, and the defendant not offering to pay the costs of the injunction, the suit was brought to a hearing. The Court held that the plaintiff was entitled to the protection of an injunction, and to the general costs of the suit. The defendant ought to have offered, after the injunction had been obtained, to pay the costs to that time, submitting to the injunction. It should be observed, that there was evidence to show that the defendant was informed, before formal notice was given to him, of the intention of the plaintiff to apply (*i*).

2. It is well settled, that a mortgagee is entitled to an injunction to restrain the mortgagor in possession from cutting timber, provided it is made to appear, on behalf of the plaintiff, that the land is an insufficient or *scanty security* without the timber (*k*). But it is obvious that, in the absence of authority, there might be as much doubt as to what is, in point of law, a *scanty security*, as upon any other question of mixed fact and law. In a recent case, however, a sort of rule was laid down as to what is meant by a sufficient security. It is not sufficient if the property is just equal to the mortgage debt and all expenses; but the proper question to be tried is, whether the property is sufficient in this sense, that the security is worth so much more than the money advanced, that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the

(*h*) 1 De Gex & Smale, 9.

(*k*) *Hippesley v. Spencer*, 5 Madd.

(*i*) See also *Losh v. Hague*, Webs.

422; and see the Treatise, p. 163.

Pat. Cas. 200.

contract between the parties at the time it was entered into (*l*). The affidavit in support of such a motion should state enough of the facts showing the value of the security, to enable the Court to judge for itself.

In a foreclosure suit, if after decree, the mortgagor, being in possession, commits waste, an injunction will be granted although the bill does not pray it (*m*).

3. Although generally a parson may not commit waste of any kind, and although generally it may be said that to convert pasture into plough land is waste, it is not every conversion of pasture into plough land that is waste, even on the part of a parson; and where it appeared that part of the glebe belonging to a rectory, which was ancient pasture, was intermixed with moss and weeds, and the defendant ploughed it up for the purpose of changing it and relaying it with grass, and swore that he believed the effect of his so proceeding would be to improve the land and increase the value of the rectory, Lord Langdale, M. R., refused to maintain an injunction. It is not to be collected from this case that wherever it may appear as the reasonable result of the evidence, that the ploughing up of ancient meadow will be for the benefit of the land, the Court would refuse to prevent the party in possession from so ploughing it up. The reasoning of the judgment shows, that it is only intended to apply to cases where the right of absolute ownership can never vest in any person, as in case of an ecclesiastical corporation; when, therefore, to hold the mere ploughing up of pasture or other conversion to be restrainable waste, without reference to its intended and probable effects, would be to impose upon lands held under such tenure the fetter of a permanent incapacity to be improved. "By the law," said his Lordship, "as admitted between lessor and lessee, or between tenant for life and remainder-man, very valuable improvements in agricul-

(*l*) *King v. Smith*, 2 Hare, 239.

(*m*) *Goodman v. Kine*, 8 Beav. 379.

ture may be prevented during the temporary possession of a tenant, or a succession of tenants for years or for life. The time however comes when the fetters imposed by the contract or relation between the parties may be released ; but if you apply the same law to the case of a parson's glebe, the course of husbandry and cultivation must remain the same in all time. What is once arable or pasture must always continue so, and no rector or vicar must employ any part of his glebe in any other manner than he found it employed, unless he can prove that it had been otherwise employed within some limited antecedent time. In a close which he cannot prove to have been employed otherwise than as meadow, he is not to plough, nor to make an orchard, nor to plant a bed of potatoes, however convenient or useful it might be for the parsonage that he should do so. He must do nothing which, as between landlord and lessee for years, the law has considered to be waste. No authority has been cited for so general a proposition, nor even upon the particular question, whether the Court ought to restrain the particular act now complained of ; and the only case of which I am aware in which the Court has interfered to stay the conversion of glebe meadow into pasture is the case of *Hoskins v. Featherstone* (2 Br. C. C. 552), where the bill was filed not against the incumbent, but against the widow of an incumbent, who was doing the acts complained of during a vacancy(n)."

4. In a case of *Kingham v. Lee(o)* an attempt was made in argument to construe the decision in *Lord Ormond v. Kinnersley (p)* as meaning that a tenant for life with a condition not to commit or permit waste is completely a trustee, so that if he alienes, thereby enabling the alienee to commit a breach of the trust, he remains himself liable for such breach. The Court would not, however, accede to this.

(n) *Duke of St. Alban's v. Skipwith*,
8 Beav. 354.

(p) 5 Mad. 369 ; and see Treatise,
p. 175.

(o) 15 Sim. 396.

“Where an estate for life,” said Sir L. Shadwell, V.C.E., “is given subject to a condition or obligation not to commit or permit waste, the tenant for life has the same unrestricted power to vest the estate in any other person as he would have had if it had not been subject to any condition or obligation whatever; but this Court would of course interpose to prevent either him or his alienee from doing any act which would be a breach of the condition or obligation, and would make them, if they were living, or their assets, if they were dead, answerable for any benefit which they might have derived from such breach.” Accordingly, in the case before the Court, it was held that where a woman, tenant for life with a condition against waste, married, and died leaving separate estate, and her husband had committed waste during the coverture, her separate estate could not be charged with the waste. The case was heard on demurrer, and the bill did not clearly allege that the feme tenant for life had separate estate, but the decision was pronounced on the assumption that the fact was well averred. With reference to the case of *Lord Ormond v. Kinnersley*, it is quite clear that all that Sir J. Leach meant was, that the condition was in the nature of a trust affecting the tenant for life whoever he might be, making him an owner coupled with a limited trust not to commit waste; not that it was a personal trust incapacitating the tenant for life from the right of alienation incident to his beneficial ownership. *Kingham v. Lee*, therefore, and *Lord Ormond v. Kinnersley* are perfectly consistent (q).

5. It has been decided, where a person domiciled abroad left personal estate both in the foreign country and in England, that his administratrix having taken out letters of administration in both countries, and being under a

(q) I make this observation because a hasty perusal of the marginal note of *Kingham v. Lee* might lead to the supposition that the doctrine of

Lord Ormond v. Kinnersley is overruled by *Kingham v. Lee*, whereas it is explained, not overruled by that case.

bond to the foreign court properly to manage the English property, will not be restrained at the suit of a mortgagee in England of part of the foreign property, from transmitting the English personalty to the foreign country: the Court assumes that the foreign court will do justice (*r*).

On the question respecting interference with the personal estate of a testator or intestate pending litigation in the Ecclesiastical Court respecting the grant of probate or letters of administration, see *Connor v. Connor* (*s*) and *Newton v. Ricketts* (*t*), in addition to the cases cited in the Treatise (*u*).

6. As to who may apply for an injunction to protect a receiver against waste, it has been held that the application must be made by some person having an interest in the estate; the agent of such a party, without showing any authority from his principal, cannot make it, even though he is a party to the suit (*x*).

7. In a recent case (*y*), the V. C. Knight Bruce intimated that the protection afforded in equity in cases of mere trespass accompanied by destructive damage to property, is more largely afforded at this day than it was formerly. "I am not convinced," says that learned judge (p. 235 of the Report), "that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swear his title to be just and valid or that of his adversary to be unjust and invalid,—does of necessity prevent a court of equity from interfering (before any judgment at

(*r*) *Wallace v. Campbell*, 4 Y. & Coll. 167.

(*x*) *Hunter v. Nockholds*, 10 Jurist, 771.

(*s*) 15 Sim. 598.

(*y*) *Haigh v. Jaggard*, 2 Coll. C. C.

(*t*) 10 Beav. 525.

231.

(*u*) Pp. 177, 178.

law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts. It is, I think, certainly true, that the Court of Chancery does not treat questions of destructive damage to property now exactly as it did forty or fifty years back; that its protection in such respects is more largely afforded than it then generally was."

Still, as to mere trespass, the jurisdiction is not extended. In a very recent case (2), where the plaintiffs and defendants were both railway companies, an injunction was asked which was in part to restrain the defendants from crossing the plaintiffs' line, and from using, for purposes alleged to be illegal, certain branch rails and a station which it was admitted they had a right to use for some purposes,—in effect, to restrain the defendants from committing trespass. Sir. J. Wigram, V. C., thus stated the doctrine,—“The jurisdiction of this Court to grant injunctions in cases of pure trespass is comparatively of modern establishment; but it is now clearly settled, that in cases of trespass under colour of title, where the mischief is irreparable, the jurisdiction of the Court exists; and I incline strongly to the opinion, that whether the mischief be irreparable or not, this Court ought by decree at least, if not upon motion, to extend and apply the jurisdiction of preventive justice to all cases of trespass in which, by analogy to cases of specific performance, damages would be an inadequate and uncertain remedy, and the protection of the right in issue the only mode of doing complete justice between the parties.” In this case it was not shown that destruction or irreparable injury would accrue, and on that ground no injunction was granted.

Care must be taken, in applying this head of equitable jurisdiction, to distinguish cases of proper trespass from cases where the legal right is in dispute, and from those where the trespass is, as expressed in the above cited

(2) *The Union Railway Company v. Bolton and Preston Railway Company*, 3 Rail. Ca. 345.

case, under colour of title. Pure trespass is only where the plaintiff is in possession, for it is elementary that without possession a man cannot bring trespass though he has the freehold in law. Where the plaintiff is out of possession, and the person in possession claims title, that is matter of ejectment, not of trespass; and equity has not in any such case interfered till the title has been established at law. Where the question is, not whether the defendant has any right, but what is the extent of his right, that is what has been termed trespass under colour of title; and in cases of this class equity may interfere.

That the Court does not interfere against *waste*, when the plaintiff claiming title is out of possession, and the title is in dispute, appears as well by the case of *Jones v. Jones* (a), and the other cases referred to in the Treatise (b), as by a very recent case decided by the Vice-Chancellor Wigram (c). In that case the bill was filed by a person who, setting out a pedigree, alleged himself to be entitled to the inheritance, and that the defendant's ancestor, under *some pretended title unknown to the plaintiff*, got into possession nearly twenty years before, and died in 1845; and that the defendant thereupon, under such pretended title, entered into possession, and had continued and then was in possession, &c. The bill alleged that the plaintiff had not discovered his own title till within a very recent period; that the defendant threatened and intended to cut down ornamental and other timber and other trees, and to sell, and had marked trees for cutting, &c., and that *thereby irreparable injury would be done*. The defendant demurred. The Court said there was no case upon real estate where a party out of possession coming to the Court and complaining of another party in possession, and claiming a right to be in possession, has granted an injunction restraining the defendant from using the legal

(a) 3 Mer. 161.

(b) P. 188 *et seq.*(c) *Davenport v. Davenport*, 7th March, 1849, MS.

rights claimed by him, until the actual right is declared at law. It was pressed on the part of the plaintiff, firstly, that the rule applied to personal property of various kinds, protecting it while the legal right is in course of determination, ought to be applied equally to the protection of real estate. 2ndly, That though the Court might refuse an injunction in such a case on interlocutory application, yet that was no reason for allowing a demurrer, because possibly at the hearing of the cause ground might exist for an injunction, and the bill ought therefore to be retained. But his Honor acquiescing in the observations of counsel as to the anomalous state of the law, considered the decision in *Jones v. Jones* applicable on both points, and allowed the demurrer.

It may be observed on this case and the case of *Jones v. Jones*, and the doctrines involved in them, that perhaps there is not ground for saying that the law is in an anomalous state. The principle of the interference of equity by injunction is, throughout, never to interfere against an apparent legal right, or claim of legal right, except where the result of non-interference will be, in the apprehension of the Court, destructive of the whole or a part of the plaintiff's property, if it turns out that he has the legal right. Equity interferes on this ground more freely in regard to personal property, for the simple reason that personal property is more susceptible of total destruction than real property. If a defendant has possession of a chattel, or of stock, or is in the exercise of a patent right or other incorporeal right, to refuse an injunction may be, under circumstances, to determine in effect the right on motion, by permitting the destruction or total removal of the subject-matter of it. But it is otherwise with regard to land; and the true principle of the decisions in *Jones v. Jones*, and *Davenport v. Davenport*, is, I apprehend, that timber is not in law a part, but only a fruit of the inheritance. Cutting it does not cause what the law holds destruction of, or irremediable injury to, the property in

dispute; and hence, if for no other reason, an injunction cannot be granted. Whether, if a plaintiff swears to a positive title, the defendant would or not be restrained from committing *destruction*, such as digging up the substance of the inheritance, on the mere ground of his possession, has, I believe, never been decided. All the cases in which the Court has actually refused to interfere, have been cases of *waste* not being in legal language *destructive* (*d*). In *Davenport v. Davenport* the bill alleged, it is true, that irremediable mischief would ensue, but it is obvious that if the law does not, as it clearly does not, consider cutting timber to be irremediable mischief, alleging it to be so, will not have the effect of making it so on demurrer. It is to be observed that *Fingal v. Blake* (*e*), in which an heir at law in possession was restrained, was not cited in *Davenport v. Davenport*.

8. On this, some late cases have been decided confirmatory of the doctrine of the older cases. Thus where a party filed his bill for an injunction, and moved, and the motion stood over, and was not brought on again for a twelve-month, the Lord Chancellor said an immediate injunction could only be granted on the ground that, to wait for the decree, would be productive of great or unknown mischief to the plaintiff; that if a complainant makes his application to the Court, and allows it to slumber, the Court will not interpose in his favour when he shows by his own conduct that he does not consider such interference to be imperative; and refused the motion (*f*).

(*d*) In *Jones v. Jones* the bill prayed an injunction against destruction; but it does not appear by the report what were the acts done or intended. In *Smith v. Collyer* (8 Ves. 89) the act was cutting timber.

(*e*) 2 Mol. 542; and see the Treatise, p. 189.

(*f*) *Pickford v. Grand Junction Railway Company*, 3 Rail. Cas. 538; see also *Powell v. Thomas*, 6 Hare, 300; *Haines v. Taylor*, 2 Phil. 209.

CHAPTER II.

Injunctions to restrain Infringement of Copyright.

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| 1. <i>The Copyright Act, 5 & 6 Vict. c. 45.</i>
2. <i>Doctrine of Byron v. Johnstone.</i>
3. <i>What is fair Use of a preceding Publication.</i>
4. <i>Effect of putting forth a Work as the Work of another.</i> | 5. <i>Injunctions to restrain Publication of Letters.</i>
6. <i>Injunctions to restrain Publication of unpublished Works.</i>
7. <i>Copyright in Designs.</i>
8. <i>Copyright of a Foreigner.</i>
9. <i>Copyright in Dramatic Exhibitions.</i> |
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1. **THE** late Copyright Act, 5 & 6 Vict. c. 45, repeals the 8 Ann. cap. 19, the 41 Geo. III. c. 107, and the 54 Geo. III. c. 156. It defines *copyright* to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied in the act. It defines *book* to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan, separately published; and *dramatic piece* to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment. It does not, however, introduce any *general* alteration which would have the effect of rendering useless the learning of the cases decided before the statute.

It has been stated in the Treatise (a), that to support an injunction in cases of copyright, a *primâ facie* legal title must be shown. This expression is perhaps somewhat inaccurate; what must be shown, is a *primâ facie* legal title,

(a) P. 192.

or an equity to have one. Formerly, it would seem, a legal title was required; but, since the case of *Mawman v. Tegg* (*b*), a different doctrine has been acted on, and, in addition to the cases referred to in the Treatise (*c*), may be mentioned *Chappel v. Purday* (*d*), and *Bohn v. Bogue* (*e*). There seems nothing in the 5 & 6 Vict. c. 45, to alter the practice laid down by these cases. However, the practice of putting the defendant on terms to admit at law the legal title of the plaintiff, is only applicable where the question for a court of law is not the plaintiff's title generally, but the fact of infringement or no infringement. Where the plaintiff is put or left to establish his title generally in an action, the defendant cannot be called upon to make any admissions. The whole affirmative of the issue is upon the plaintiff (*f*).

If the copyright claimed is by assignment under the 8 Ann. c. 19, the assignment, to be good at law, must be not only in writing, but attested by two witnesses (*g*).

The 5 & 6 Vict. c. 45, s. 18, has introduced a new species of title to copyright, viz. that acquired by employing and paying persons for writing in periodical works. The essential circumstance necessary to the creation of this species of copyright seems to be, that the writer shall be specifically employed to compose the contribution to the periodical, and that the contribution shall be composed under such employment on the terms that the copyright shall belong to the employer, and be paid for by him. It has been doubted whether, when the publishers of a periodical pay an editor generally for compiling the periodical, and the editor employs and pays the writer of particular articles, the copyright in such writings is in the publisher, within the 5 & 6 Vict. c. 45 (*h*).

(*b*) 2 Russ. 385, referred to on this point in the Treatise, pp. 196, 197.

(*c*) P. 197.

(*d*) 4 Yo. & Col. Eq. Exch. 485.

(*e*) 10 Jurist, 420.

(*f*) *Duke of Beaufort v. Morris*,

2 Phil. 683; and see the observations of Lord Cottenham in *Elderton v. Lack*, 2 Phil. 683.

(*g*) *Davidson v. Bohn*, 12 Jurist, 922.

(*h*) *Brown v. Cooke*, 11 Jurist, 77.

It must be observed also, that by the 24th sect. of the 5 & 6 Vict. c. 45, no proprietor of copyright in any book which shall be first published after the passing of the act can proceed at law or in equity in respect of any infringement, without having first made an entry in the book of the registrar of the Stationers' Company pursuant to the act. (See sections 13 and 19.) So that an injunction bill to restrain infringement of copyright under the 5 & 6 Vict. c. 45, should aver that registration has been duly made.

2. With reference to the jurisdiction exercised in *Byron v. Johnstone* (i), to restrain the publication of a work in the name of an author, when there is strong ground to believe it is not that author's work, it must be observed, that the principle of that jurisdiction is, that a work shall not be published in the name of a person who repudiates it; or, as a more general proposition, that a fraudulent use shall not be made of another's name, affecting his rights of property; but, to lay the ground for this interposition of equity, it is requisite that the plaintiff shall be in the habit of doing the thing that the defendant represents him to be doing; for if he is not, he is not damnified in his property. Therefore, where an eminent physician, who was not in the habit of making medicines for sale, filed his bill for an injunction to restrain A. from vending certain pills, which he represented as the plaintiff's, so as to hold out that they were compounded by and sold on behalf of the plaintiff, the Court refused an injunction. The Court held that the case was defamation, if any thing; that equity could not determine whether it was so or not; and that it could not be considered at all made out, that the act of the defendant could be any injury to the property of the plaintiff (k). The decision is at least singular, and seems founded on an exaggerated idea of the impregnability of a high professional

(i) 2 Mer. 29; and see Treatise, p. 195.

(k) *Clark v. Freeman*, 12 Jurist, 149.

reputation. That the act of the defendant amounted to a fraudulent use of the plaintiff's name, cannot be doubted. Neither can there be much doubt that the plaintiff might be injured in reference to property by such fraudulent act, since it is tolerably clear, that if the public believed the pills were compounded by the plaintiff, they would or might be induced to buy the pills instead of consulting him. In *Millington v. Fox* (l), the Court held that there is a title in trade marks, independently of fraud; and if that is so, surely there is in every one a title in his *name*, independently of fraud. At any rate it is perfectly clear, that a fraudulent adoption by one *trader* of the name, or style, or trade mark of another; any fraudulent representation, in fact, leading the public to suppose that they are dealing with another, will not be permitted, on the ground of its being a fraud on the party and the public. And it may be thought that there is no distinction as to fraud of that double kind, between the fraudulent use of a tradesman's name or mark, whereby the public buys from another, intending to buy from and believing they are buying from him; and the fraudulent use of the name of an eminent professional man, whereby the public buys something, believing it to be his production, the result of which buying and belief may be, as to the individual, either by actual loss of business, or by injury to his reputation, to contract the professional employment given to him by the public. That such use of an eminent man's name is a fraud on the public, is clear.

3. (m) The doctrine that it is value and not quantity of matter pirated that influences the Court, was acted upon in *Bohn v. Bogue* (n), although the defendant had taken a very small portion of the plaintiff's work; yet as his own statement gathered from his preface was, that what he had

(l) 3 Myl. & C. 338; see Treat. 232.

(n) Cited *supra*, p. 33.

(m) See p. 197 *et seq.* of the Treat.

rejected was worthless, so that in effect he had taken the very marrow of the plaintiff's work, an injunction was granted. So in another case (*Campbell v. Scott*) (o), which was a case of alleged infringement by printing whole passages from the plaintiff's book, the taking of the plaintiff's compositions by the defendant was admitted; the defence was, that the matter taken from the plaintiff was trivial in quantity, and that it was used by way of illustration, and could not injure the plaintiff's sale. The Court thought it was not used merely by way of illustration, but formed part of the *substratum* of the defendant's work; and, as to the question of *damnum*, it was held that where there was clearly *injuria*, the *damnum* was matter of which the plaintiff was to judge, and an injunction was granted.

When it is said that a *bonâ fide* abridgment (p) will not be restrained, it must be understood that abridgment is not merely eliminating passages from another man's work, but that use of it which, in the fair exercise of a mental operation, deserves the character of an original work (q).

In *Dickens v. Lee* the plaintiff's work was an imaginative tale; the defendant had taken the fable, the characters, the incidents, the names, and even the style of language. It is to be gathered from the report, that thus using all the plaintiff's materials, he had told the story in a shorter manner, and he relied upon abridgment as his defence; but the Court held that such an abridgment was not an exercise of mental labour deserving the character of an original work, and maintained an injunction, putting the plaintiff to establish his right at law, if the defendant desired it.

4. The decisions on this head (r) proceed more on the ground of fraud than of invasion of property; to this prin-

(o) 11 Sim. 31.

(p) See p. 199 of the Treatise.

(q) *Wilkins v. Aitkin*, 17 Ves. 422;

and *Dickens v. Lee*, 8 Jurist, 183.

(r) See p. 203 of the Treatise.

ciple may be referred the case of *Seeley v. Fisher* (s), where an injunction was granted to restrain A. from putting forth his work under advertisements which the Court below thought tended to produce the impression, contrary to the truth, that it contained matter which was in fact the property of B. But if there be no such fraudulent misrepresentation, but only statements which, whether true or false, tend merely to encourage a belief that the matter contained in A.'s work is the truly valuable matter, and that contained in B.'s is spurious and of no value, an injunction will not be granted to restrain such representations; and, on the ground that such was the true effect of the advertisements, the Lord Chancellor dissolved the injunction.

5. To the cases referred to in the Treatise (t) on this subject may be added the recent case of *Palin v. Gathercole* (u). In that case the point decided as to the right of the receiver of letters to publish them was this, that he will not be permitted to publish them for the purpose of representing to the public as true, that which he has, in legal proceedings upon that very question, admitted to be false. The circumstances of that case were these:—Palin, the plaintiff, had written to Gathercole, the defendant, who was the editor of a newspaper, certain letters, containing information respecting one Nokes, and Gathercole, from these letters, drew up an article which he published in his newspaper. Nokes brought an action against him for libel, and he compromised the action, paying Nokes' costs, and apologizing. Gathercole then claimed of Palin half the costs that he, Gathercole, had so incurred, and Palin refusing to pay them, Gathercole published in his newspaper a statement that the libel upon Nokes was communicated to him, Gathercole, by Palin. Palin there-

(s) 11 Sim. 581.

(u) 1 Coll. 565.

(t) See p. 206 *et seq.* of Treatise.

upon brought an action against Gathercole, and Gathercole pleaded that the matter, however libellous as between Nokes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author; but before trial Gathercole submitted to what was in effect a general verdict, establishing in substance, as his Honor the V. C. Knight Bruce expressed it in his judgment, that the libel published by Gathercole of Nokes was not a libel which Palin had communicated to Gathercole. Gathercole then proceeded to show Palin's letters to third persons, upon which Palin filed his bill for an injunction to restrain Gathercole from publishing or showing the letters, and obtained an *ex parte* injunction. The use which Gathercole desired to make of the letters was, it will be observed, to establish the fact that Palin was the author of the libel upon Nokes, the very fact which he had, by submitting to the general verdict in Palin's action, admitted not to exist. Under these circumstances the Court refused to dissolve the injunction, permitting, however, the defendant to exhibit the letters to his solicitors and counsel in the cause.

6. These cases rest upon the principle of property, in the sense of one's exclusive right to the use of his own production, in any way except by making it the subject of *copyright*, strictly so called (*v*).

The recent case of *Attorney-General v. Strange* raised this question, whether on the ground of property, apart from all question of fraud, a person composing etchings can restrain another, who, without his consent, has obtained copies of such etchings, from publishing a catalogue of them; and it was held by the Vice-Chancellor Knight Bruce (*w*), and afterwards on appeal by the Lord Chancellor (*x*), that he can.

On this point Lord Cottenham said, "it being admitted

(*v*) See p. 209 of the Treatise.

(*x*) 13 Jurist, 109.

(*w*) 13 Jurist, 45.

that the defendant could not publish a copy, that is, an impression of the etchings, how on principle does the case of a catalogue, list, or description, differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar. It is to make known to the public more or less the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others."

7. A species of copyright is given in designs for *ornamenting* certain manufactures, and for designs having reference to some purpose of *utility* for the *shape or configuration* of manufactures, by the 5 & 6 Vict. 100, and 6 & 7 Vict. c. 65.

The 3rd section of the first statute gives to the proprietor of any design within the meaning of the act, the sole right to *apply* such design to any article for a limited time. The 7th section enacts, that no person shall *apply* any such design, or any fraudulent imitation thereof, *for the purpose of sale*, without the licence in writing of the proprietor. It has been determined, that the general language of the entitling section, the 3rd, is not cut down by that of the 7th, and that an injunction will be granted to restrain a person from *applying* the plaintiff's design to any article during the term of the copyright, though he does not sell such article, and does not intend to sell it during the term (*y*).

8. The point discussed in the Treatise (*z*) in reference to *D'Almaine v. Boosey* (*a*) has been conclusively settled

(*y*) *M'Crea v. Holdsworth*, 12 Jurist, 820.

(*z*) P. 216.

(*a*) 1 Y. & Col. 288.

by a late case (*b*), in which it was laid down by the whole Court of Common Pleas, that an alien friend, the author of a work, of which he is also the first publisher in England, and which has not been made *publici juris* by a previous publication elsewhere, has a copyright in that work, whether it be composed in this country or not, and that such copyright is not defeated by a *cotemporaneous* publication abroad.

9. Under the 5 & 6 Vict. c. 115, the author of any dramatic piece of music has the sole liberty of representing or performing it generally, that is, anywhere, and not as in the case of ordinary dramatic works, only at some *places of dramatic entertainment*; and therefore the author of a song, and of the music to which it is set, will be protected by injunction against its being publicly performed, sung or recited generally (*c*).

(*b*) *Cocks v. Purday*, 12 Jurist, 677. (*c*) *Russell v. Smith*, 15 Sim. 181.

CHAPTER III.

Injunctions to restrain the Infringement of Patents.

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| 1. <i>Distinction as to when the Court will interfere and when not.</i>
2. <i>When a Party does not move within a reasonable Time of filing the Bill.</i>
3. <i>Where the Equity appears only by the Answer.</i> | 4. <i>What Affidavit requisite to support Application, and when Motion is on Notice.</i>
5. <i>Of granting Inspection.</i> |
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ALTHOUGH a verdict has been obtained by a patentee, yet if it is subject to a bill of exceptions properly tendered, the Court will not in general consider the trial complete, and will not grant an injunction till the bill of exceptions is disposed of (*a*). And although a patent may have been the subject of several actions, in all of which the novelty and utility of the invention have been put in issue, and verdicts have been for the patentee, yet if on a bill filed by him against another person, the defendant's case is, that his alleged infringement is quite different from those which were in issue in the actions, an injunction will not be granted pending the trial of the right, merely on the ground of the plaintiff having succeeded in the actions (*b*).

(*a*) *Bridson v. M'Alpine*, 8 Beav. 229.

(*b*) *Crosskill v. Every*, Rolls, January 20, 1848, MS.; and see a report of this case in 10 Law Times, p. 459, which somewhat overstates the effect of the decision. The writer was counsel in the case of *Crosskill v. Every*, and is able to state from personal recollection, the point, and the

only point, which was actually decided. The defendant's case, in support of which he tendered evidence, was, that the machine made by him differed very much from those made by the defendants in the cases in which the plaintiff had recovered verdicts at law. The question of fact, therefore, between him and the plaintiff was quite distinct from that in the cases in which ver-

In *Bridson v. Benecke* (c) the Master of the Rolls again laid it down that a verdict in an action between A. and B. is not conclusive for the purpose of granting an injunction pending the trial of the right in a suit for an injunction between A. and C. ; but the Court will give great weight to it, especially so far as the points raised between A. and C. are the same as those determined between A. and B.

As to the effect of laches in a plaintiff who has obtained an injunction on the terms of speedily trying the right, the following case has recently been decided.

An injunction was granted at the end of Michaelmas term, on the terms of the plaintiff bringing his action at the sittings after that term, and it was in the paper for trial in February, but the plaintiff postponed it on account of the absence of his leading counsel, and afterwards again postponed it because there was not a sufficient number of special jurymen present, so that the action had not been tried on the 29th of July. The Court held that the injunction was not to be sustained because the plaintiff, for his own convenience, had neglected to go to a speedy trial, and dissolved it (d).

It has been stated in the Treatise (e) that it would be perceived from the cases there referred to, that wherever there is any considerable doubt as to the validity of a patent at law, an injunction is either not granted at all, or is only granted on terms, in order to prevent irreparable damage before the title can be tried at law.

The application of this principle to each particular case will however depend on the circumstances of the case ; and in considering whether an injunction will be granted or refused in the first instance, pending the determination of the legal right, it must be considered whether irreparable or great injury will have been done to the de-

dicts had been given ; and on this ground it was that the Court intimated that the verdicts would not entitle the plaintiff, as a matter of course, to an injunction.

(c) Rolls, February 9, 1849. MS.

(d) *Stevens v. Keating*, 2 Phill. 333.

(e) Page 223.

fendant by the injunction, should the plaintiff's legal right fail; or to the plaintiff by refusing it, should he turn out to have a legal right. Generally it may be said, that unless the plaintiff's legal right is clear, the Court will not at this day grant an injunction while the legal right is in course of trial (*f*).

It has been also stated in the Treatise (*g*), that in the case of *Bacon v. Jones*, Lord Cottenham had observed that he never had granted, and probably never would grant, an injunction to restrain infringement of a patent without putting the plaintiff to try the right at law, if the defendant desired it. This point has been since much discussed. In a case of *Wilson v. Tindal* (*h*), Lord Langdale, M. R., said, arguendo, he had no doubt of the competency of the Court to grant an injunction simpliciter; that it was not the right of parties in every case to have an action tried in a court of law; that it is a question of convenience, and that the Court is to exercise a fair discretion. However, in *Harman v. Jones* (*i*), Lord Cottenham held that where the legal right is in contest, it is the duty of the Court, in granting an injunction, to put the legal question in a course of immediate investigation, whether that be asked for or not; and an injunction simply, without a direction to the plaintiff to bring an action, or without some direction for the trial of the legal right, will, on the ground of that omission only, be varied. So if an injunction is refused, the order is not correct if it does not contain some direction enabling the parties to proceed at law (*k*). And where the injunction is to restrain a party from enforcing a legal right, the Court ought not to grant it without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered (*l*).

(*f*) *Spottiswoode v. Clarke*, 2 Phil. 154.

(*g*) Page 224.

(*h*) *Webs. Pat. Cas.* 730.

(*i*) 1 Cr. & Phil. 299.

(*k*) *Swallow v. Wallingford*, 12 Jurist, 403.

(*l*) *Sanster v. Foster*, 1 Cr. & Phil. 302.

From these cases, and from the doctrine so frequently laid down by Lord Cottenham, that the Court is not in matters of injunction to try a legal right, it seems to follow, that the dictum in *Wilson v. Tindal* cannot be supported, and that it is of right in the parties to have a trial at law of some kind of the legal right.

2. On the question, what the Court will do at the hearing, where a party files a bill praying an injunction, and does not move within a reasonable time after filing the bill for an interlocutory injunction (*m*), some important distinctions have been taken in recent cases. Where in a case upon the right to a trade mark, these circumstances existed, but at the hearing, though the plaintiff did not establish by the evidence his right to the injunction, the evidence showed that the defendants had at least acted so that the public might think they were buying the plaintiff's goods, the Court offered to the plaintiffs to retain the bill, if they would waive all account and pay the costs of the evidence; and if they refused that, then it offered to the defendants to dismiss the bill *without costs*, or to retain the bill with liberty to bring an action (*n*). But if a plaintiff has obtained an injunction on filing, or within a reasonable time of filing the bill, without being put to establish his right at law, and the cause goes on to a hearing, and at the hearing the defendants still contend that they have a right to do the acts complained of, the Court will not dismiss the bill, but will retain it for a time, with liberty for the plaintiff to bring an action (*o*). And here it may be observed, that a plaintiff whose right to equitable assistance depends on the legal right, may move at once for leave to try the legal right, without asking for an injunction, if the answer denies the legal right (*p*).

(*m*) See p. 224 of the Treatise.

Hare, 340; and *Ward v. Key*, 10

(*n*) *Rodgers v. Nowill*, 6 Hare, 325.

Jurist, 792.

(*o*) *Duke of Beaufort v. Morris*, 6

(*p*) *Rodgers v. Powell*, 6 Hare, 332.

3. A point similar to that raised in *Curtis v. Cutts* (q) was decided in a very recent case (r), where the Vice-Chancellor of England held that a common injunction could not be maintained where the answer denied all the plaintiff's case, but made by other allegations a case, on which, if the plaintiff had made them, he would have had an equity for an injunction. *Curtis v. Cutts* was not cited in this case (s).

4. (t) Whether, to support an application for an injunction made upon notice, an affidavit is necessary that the plaintiff *believes* himself the true inventor at the time of making the application, cannot be considered as settled by decision, and may be doubted. In *Hill v. Thompson* (u) Lord Eldon was not only dealing with an *ex parte* application, but expressly confined his remarks to such an application. In *Sturz v. De la Rue* (v) Lord Lyndhurst's expression is general (w); but he was dealing with an *ex parte* application, and it is submitted that his decision must be construed with reference to the subject-matter of it. In a case of *Neilson v. Thompson* (x) the very point occurred, and was raised in argument; and although the affidavit did not go to the belief of the patentee at the time of making the application, the injunction was granted. Great weight cannot, however, be attributed to this decision, because it does not appear that the attention of the Court was expressly directed to the point at the time of giving judgment.

It is submitted that the reasons for such an affidavit in support of a motion *ex parte*, fail altogether on a motion

(q) See the Treatise, p. 224; 8 Law Journ. 184.

(r) *Creasy v. Beavan*, 14 Sim. 99.

(s) I think it right to apprise the learned reader that I have been informed by one of the learned reporters who conducted the authorized reports in Lord Cottenham's Court when *Cutts v. Curtis* was decided, that they

were not satisfied that Lord Cottenham expressed himself to the effect attributed to him in the report in the Law Journal.

(t) See p. 226 of the Treatise.

(u) 3 Mer. 622.

(v) 5 Russ. 322.

(x) 1 Web. Pat. Cas. 276, n. (a).

made upon notice. On an *ex parte* motion the Court has before it only the applicant, and granting, if at all, only on the ground of pressing danger, an order, which may be highly prejudicial to the defendant, requires all the evidence that can be *primâ facie* obtained in support of the justice of the claim. It would be, indeed, a strong thing to give to one party an injunction against another behind his back, without putting the applicant to pledge his own belief to the truth of those facts which support his title; for the Court has on such an occasion no means of knowing whether there is not to the plaintiff's title, the objection of want of novelty, except by the plaintiff's own statement. But when the motion is made on notice, the plaintiff and defendant are at arms-length. The plaintiff produces the patent, which shows *primâ facie* his legal title. That legal title may be invalidated by some matter of fact; but if it is, is it not for the defendant to show that there is such a defect? The plaintiff's belief of the novelty of the invention is merely evidence, and may be well or ill founded; and the validity of his title is only so far affected by it as it is evidence. Suppose, for instance, that a patentee plaintiff swore that he believed the invention not to be new, stating as the ground of his belief that A. had invented the same thing before the date of the patent; and suppose that before the motion comes on, he discovers from A., and A. files an affidavit to prove the fact that the plaintiff was mistaken in the date of A.'s invention, and that A. had not made it till after the grant of the patent. Can there be any doubt that if the Court believed A., the plaintiff's unfounded belief would be no evidence against the validity of his title? No doubt if a plaintiff alleged on his bill that he believed the invention not to be new, he would state himself out of Court, not because his so believing, of itself invalidates the patent, but because the Court would believe against the party, as matter of evidence, what he himself believed. But to *require* a plaintiff, on an application for an injunction, which admits evidence

on the part of the defendant, to swear that he believes the invention new, or in default to refuse an injunction, appears to the writer to be presuming the invalidity of a *primâ facie* legal title; and in effect requiring proof of a negative, by calling upon the party showing such legal title, to prove that it is not bad, instead of throwing on the party contesting its validity, the onus of proof that it is bad.

5. Before concluding this subject, it will be proper to refer to the practice of ordering inspection in aid of a trial of the legal right. Where a court of equity, on a motion for or to dissolve an injunction, has thought it necessary to send the case to be tried at law, it has sometimes, under circumstances, put one and sometimes each of the parties upon terms to show his premises and machinery to the other party or his agents. This was done in the cases of *Russell v. Cowley* (y) and *Morgan v. Seaward* (z). In *Russell v. Cowley* the order made upon the motion of the plaintiff for an injunction, and affidavits read on both sides, was, that the plaintiff should be at liberty to bring such action as he should be advised, and an account to be kept; and that the defendant should *permit and suffer* the plaintiff's solicitor, and certain witnesses named in the order, to inspect the premises and machinery of the defendant; and the defendant was to set his machinery to work in presence of such persons, and the defendant was to have a like liberty; the object of the Court, expressed in the order, being to afford the plaintiff and defendant respectively the means of giving such evidence to the Court and jury on the trial at law as should show the fact of infringement or no infringement (a). It appears by Mr. Webster's report that the order was by consent; that, however, does not appear upon the order itself.

In *Morgan v. Seaward*, which was heard on motion to dissolve an injunction obtained by the plaintiff, the evi-

(y) Webs. Pat. Cas. 457.

(a) Reg. Lib. 1832, fol. 2250.

(z) *Ibid.* 167.

dence was very voluminous and conflicting; but the principal point to be determined was, whether the machinery used by defendants to give a particular movement to a paddle-wheel, was substantially the same combination as the machinery used by plaintiff. The Court being unable, from the evidence before it, to determine the point, dissolved the injunction, directing that plaintiffs should be at liberty to bring such action as they might be advised, and in the meantime an account to be kept; and the plaintiffs were to have liberty, at reasonable times, for themselves and their scientific witnesses to inspect the paddle-wheels made by the defendant (*b*). The order in this case was not by arrangement. Whether any opposition was made to the inspection does not appear by the report. It is to be presumed that none was offered.

The case cited usually as an authority for this practice is *Brown v. Moore*, a note of which is to be found in 3 Bligh's Appeal Cases, 178; but it is not clear that any such order was made in that case.

In 3 Swanston, p. 264, n. (*a*), *Brown v. Moore* is mentioned with a note, that "no entry of it occurs in the registrar's book."

All, in fact, that can safely be collected from the case of *Brown v. Moore* is, that *an inspection* had taken place; but it does not appear clear whether that inspection was or was not under an order of the Court, and if it was, what were the circumstances under which the order was made.

The question, how far the Court will go in compelling a party to submit to inspection of his premises, and on what its authority to do so is grounded, was much discussed in *Kynaston v. The East India Company* (*c*), and *East India Company v. Kynaston* (*d*). In that case the plaintiff claimed tithe of certain houses, warehouses, and wharfs,

(*b*) Reg. Lib. 1834, fol. 1095.

(*d*) 3 Bligh's Appeal Cases, 153.

(*c*) 3 Swanst. 248.

in the occupation of the defendants, in the city of London. The cause was heard at the Rolls in March, 1818, when his Honor the Master of the Rolls declared that the plaintiff was entitled to tithes after the rate of 2s. 9d. in the pound upon the annual value of certain of the premises, and ordered a reference to the Master to ascertain the value of such premises. Afterwards the plaintiff moved before the Vice-Chancellor, that certain persons, named Joseph Sill and Robert Smith, might be at liberty to inspect the defendants' premises preparatory to their being examined as witnesses upon interrogatories for proving their value, whereupon his Honor made an order, referring it to the Master to inquire whether such inspection was necessary, and the Master reported that such inspection was necessary. From this order the defendants appealed to the Lord Chancellor, who, after hearing the arguments, said, "The question is, whether the Vice-Chancellor was right in taking a step which leads to giving liberty, if the Master should think it necessary, to the plaintiff to appoint persons to examine the warehouses. On the Master's report, the propriety of the order cannot be questioned. It may be right that the terms of the order should be altered, directing, not that witnesses shall be at liberty, but that the East India Company shall give them liberty to inspect; and then comes the question, whether this Court has authority to make an order on the defendants to give such liberty. I have found no case in point; but, on principle, I think that the Court has authority. It has been admitted on all sides, that where houses and warehouses in London have never been let, tithes are to be paid according to the rent which they are worth to be let at. Some of the old cases say that there is no authority in the statute for charging those houses at all, but it was admitted at the bar that the point is now decided; and I must take it, that if a person has property of the various descriptions enumerated not let, the tithe-owner, whether lay or ecclesiastical, is entitled to 2s. 9d.

in the pound, not on the rent, for there is none, but on the value, that is, the value at which it might be let. Under that act this Court has undoubted jurisdiction to entertain the suit; that point, though formerly questioned, is now settled by many decisions. Having jurisdiction, the Court must in course direct an account of tithes, by directing an account of what is the value of the premises to be let; and the question is, whether, in such a case, the Court must not have the means of ascertaining by the inspection of witnesses the nature of the premises, in order to ascertain their value; and whether the law meant to leave it thus, that the defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value; but, on the other hand, the plaintiff was to be in such circumstances, that he could examine no witnesses who knew with precision the value of the premises. It is obvious that the capacity of warehouses, of equal external dimensions, for holding goods, might be greater or less, and that the rent would be higher or lower, according to the capacity and accommodation of a warehouse. It is admitted, that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case where, on a suggestion that a machine used by the defendant was an infringement of a patent, the Court ordered the defendant to allow an entry into his premises for the purpose of ascertaining, by inspection, whether the machine was an infringement (*b*). So, in the instance of partition of a house, the tenant having a right to the exclusive possession of it during a term, on a bill for partition, the Court would order an entry for the purpose of determining in what manner the house could be divided, or what must be paid for owelty of partition.

“ But it is said that in these cases the parties had an interest in the property, or an interest under a contract. I

(*b*) The case alluded to by the Lord Chancellor is supposed to be *Brown v. Moore*.

say that this parliamentary contract is on the same ground, because every person claiming under it has an interest in the premises; and if, without this proceeding, the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is, that on principle it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom the order is made.

“Cases relative to the production of deeds and papers are not applicable, because there is a particular right to call for the production of those deeds; but on these general principles the Court must make the order.”

Afterwards the Vice-Chancellor confirmed the Master's report, and ordered that the defendants should *permit* Joseph Sills and Robert Smith to inspect the several warehouses, &c., preparatory to their being examined as witnesses upon interrogatories. From this order also the defendants appealed to the Lord Chancellor, who, on the 4th May following, ordered that both the orders made by the Vice-Chancellor should be affirmed.

On appeal to the House of Lords the three orders were confirmed. Lord Redesdale, in delivering his opinion, made a distinction between an order directing a *forcible entry* to inspect, and an order on the defendant directing him to *permit inspection*, and seemed to doubt whether the Court would make an order for forcible entry. He said, “Courts of equity proceed always indirectly, by process of contempt, in all cases except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree.” And further, “in case of chattels, they frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force.”

The Lord Chancellor, however, intimated, that the Court might not be bound within those limits. He said, "If the defendants refuse to *permit* inspection, the Court will then have to consider what ought to be done, whether they will compel the inspection, and how. No such order has yet been made, but the Court can find the way to do complete justice."

In cases of injunctions to restrain the working of mines, the practice of the Courts of Equity of ordering inspection is well settled (*c*).

The cases seem, on the whole, to justify the following conclusion: that in questions as to the infringement of patents, a Court of Equity will make an order in substance compelling the defendant to submit to inspection of his premises and machinery, where the evidence before the Court is sufficient to raise a strong presumption of the fact of infringement, and where it appears to the Court that without such inspection satisfactory evidence cannot be obtained; provided, in the words of Lord Eldon, the Court must miscarry, and the justice of the case cannot be obtained without it. And therefore, if a case were to arise, in which the preponderance of evidence in favor of the presumption of infringement were to be slight, and it could be shown that irreparable or great injury might be done to the defendant by the inspection, if the fact should turn out that there was no infringement, it may be well doubted, upon the authority of the cases cited, whether the Court would make the order (*d*).

(*c*) *Lord Lonsdale v. Curwen*, and *Walker v. Fletcher*, 3 Bligh's App. Cas. note, 168 to 178. In the former of these cases the order was, that the plaintiff should *be at liberty* to inspect defendant's workings, and not merely that the defendant should *permit* inspection; and in *Walker v. Fletcher* the terms of the order were similar,

but in that case the liberty to inspect was reciprocal.

(*d*) It is perfectly obvious, that if the defendant's case were that he was using an invention of his own, irreparable injury to him might be caused by an inspection, if it should turn out that there was no infringement.

CHAPTER IV.

Injunctions to restrain the Use of another's Name or Designation, and the Imitation of Trade Marks.

THE principle upon which injunctions are granted to restrain the imitation of trade marks (*a*), long exclusively used by a particular trader, so as to connect his name or trading concern with the reputation acquired in the market by the goods bearing the particular mark, is thus expressed by Lord Langdale in *Perry v. Truefitt* (*b*), "I think that the principle on which both the courts of law and equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but, whether he has or not a property in the name or the mark, I have no doubt that another has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark." And in a subsequent case (*c*) the same learned judge again expressed himself to the same effect: "No man has a right," said his Lordship, "to sell his own goods as the

(*a*) See Treatise, p. 230.

(*b*) 6 Beav. 66.

(*c*) *Croft v. Day*, 7 Beav. 84; see also *Gout v. Aleploglu*, 6 Beav. 69, n.

goods of another. You may express the same principle in a different form, and say, that no man has a right to dress himself in colours, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court does not depend upon any exclusive right which he may be supposed to have to a particular name or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." Accordingly, in *Croft v. Day*, his Lordship being of opinion that, although the labels used by the defendant upon the bottles of blacking sold by him, were in many points different from the plaintiff's labels, yet there was sufficient to mislead the ordinary run of persons, and that the object of the defendant was to persuade the public that his establishment was in some way or other connected with the plaintiff's, granted an injunction restraining the defendant from imitating the plaintiff's labels. The order made was very specially worded, with a view to prevent the defendant from eluding the jurisdiction by colourable alteration.

In *Perry v. Truefitt (d)*, the point on which the case was principally argued was, whether a certain unguent sold by the plaintiff having acquired a reputation under the name of "Perry's Medicated Mexican Balm," the defendant was at liberty to sell an unguent for the same purpose under the designation of "Truefitt's Medicated

Mexican Balm." The evidence showed that Truefitt (the defendant) did not attempt to induce the belief that what he was selling was the plaintiff's unguent, but he simply took the sort of fancy designation adopted by the plaintiff, of *Medicated Mexican Balm*. And the question was, whether, in the absence of fraud, the plaintiff had such a right in that designation as to prevent the defendant's use of it. This the Court held to be a legal question; and if that had been the only point, the Court would, it seems, have put the matter in a course for trial of the legal right. But the plaintiff had also, in advertisements respecting his medicated Mexican balm, put forth false representations to the public, and thereby precluded himself(e) from obtaining relief in equity in the first instance. The motion was ordered to stand over, with liberty to the plaintiff to bring an action; and some months afterwards the bill was dismissed with the consent of the plaintiff.

It will be observed, that both in *Perry v. Truefitt* and *Croft v. Day*, Lord Langdale took occasion pointedly to advert to the doctrine of *Millington v. Fox* (f), and to express his opinion, that an exclusive right of property cannot be acquired in a name or mark. "The case of *Millington v. Fox*," said his Lordship, in *Truefitt v. Perry* (g), "seems to have gone this length, that the deception need not be intentional; and that a man, though not intending any injury to another, shall not be allowed to adopt the mark by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. *I am not aware that any previous case carried the principle to that extent.*" The writer believes that there is not any case since *Perry v. Truefitt* and *Day v. Croft* carrying the principle so far as it was carried in *Millington v. Fox*. It will not, however, be forgotten, that that case was most fully argued, and that the judgment is one of the most careful of the

(e) *Pidding v. Howe*, 8 Sim. 477.

(g) 7 Beav. 73.

(f) 3 My. & C. 338.

many elaborate judgments delivered by the eminently cautious judge who pronounced it.

Cases of this sort will necessarily depend very much upon the particular circumstances. The principle on which they proceed, subject always to the doctrine of *Millington v. Fox*, is fraud; and, as observed by the Master of the Rolls in *Franks v. Weaver* (*h*), "nobody has been able to define what fraud is, it is so multiform." It must not be concluded, however, that in case of trade marks or designations a specific use of the plaintiff's name or mark *modo et formâ* is requisite to entitle him to an injunction. The Court in these cases looks not to the letter but to the substance, and if upon the evidence it can come judicially to the conclusion that the defendant has contrived to make it appear to the public that the thing sold by him is prepared by the plaintiff, he will be restrained. Thus in *Franks v. Weaver*, where the plaintiff was the proprietor of a medicine sold in wrappers, headed "Franks' Solution of Copaiba," and such wrappers contained testimonials, the defendant was restrained from selling a medicine in wrappers headed "Chemical Solution of Copaiba," setting forth the excellent properties of Franks' solution, and the testimonials to the merits of Franks' solution. The Court came to the conclusion, that though the defendant did not adopt the name of Franks, yet he craftily surrounded the title given to his own solution by such indicia as would lead the public to suppose he was in truth selling Franks' solution, and therefore an injunction was granted.

In a case of *Hine v. Lart* (*i*), the plaintiff sought to bring himself within *Millington v. Fox* by an allegation supported by some evidence of long exclusive user of a trade mark. The defendants denied the plaintiff's right, but admitted they had closely copied his marks. The evidence was conflicting as to the right. The Vice-Chancellor of England held that the defendants, by imitating the plain-

(*h*) 10 Beav. 297.

(*i*) 10 Jurist, 106.

tiff's marks as they had done, must have known they might gain an advantage to which they were not entitled, and supported an injunction. The case seems open to considerable doubt. If it be considered as a case of property, within the doctrine of *Millington v. Fox*, it seems inconsistent with the well settled doctrine, that an injunction will not be granted on a doubtful legal right; and as a case of fraudulent imitation, it seems to fail in that which is the essence of such cases, evidence that the defendant held his goods out so that the public bought them as the goods of the plaintiff. Nothing of the kind appears, according to the report, either on the bill or in the evidence. It must be observed, also, on this doctrine of protecting trade marks, that if the differences between the designation adopted by the plaintiff and that resorted to by the defendant, are sufficient to rebut the presumption of deception, an injunction will not be granted (*k*).

(*k*) *London and Provincial Law v. Provincial Joint Stock Life Assurance Society v. London and Provincial Joint Stock Life Assurance Society*, 11 Jurist, 938.

CHAPTER V.

Injunctions to restrain Nuisance.

 1. *Nuisances generally.*

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2. *Contingent Nuisance.*

1. IN *Hilton v. Lord Granville* (a) the Court expressed itself thus: "The rights asserted on the part of the plaintiff and of the defendant are legal rights; and the plaintiff asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to show that the right has been established, or that, having had no means of establishing it, but the right being *primâ facie* well founded, the interference of this Court is necessary to prevent that species and extent of mischief which this Court calls irremediable, before the right can be established by legal proceedings."

In this case the plaintiff was a copyholder of the manor of Newcastle-under-Lyne, holding as such some copyhold houses. The defendant was the lessee of the crown of mines of coal and ironstone in the manor; and as such had worked for a long time and was working the mines, so as to have produced actual damage to many other houses similarly situated with the plaintiff's, and so as to produce extreme probability of damage to the plaintiff; but there was no proof that *destruction* or *irremediable* damage was likely to be produced. The defendant's legal right to work was clear, subject to the plaintiff's legal right to be compensated for damage done, if he had such right. The plaintiff had such *primâ facie* right, but it had not been established at law. In this state of things the Master of

(a) 4 Beav. 130.

the Rolls refused to interfere, upon the principles above stated.

On appeal, the Lord Chancellor agreed that an injunction could not be granted, but varied the order by directing the motion to stand over, and giving liberty to the plaintiff to bring an action, putting the defendant to make certain admissions necessary for the proper trial of the legal right (*b*).

2(*c*). In *Haines v. Taylor* (*d*), where the defendant was proceeding to erect gas works on a piece of ground within 88 yards of the plaintiff's house, and, in addition to the circumstance, that as no gas was yet being made, the injury was prospective and contingent, the evidence was conflicting whether, by the result of scientific improvements proceeding in the manufacture of gas, all offensive effect of the manufacture, when actually commenced, would not be removed, the Court refused a motion to restrain the defendants from proceeding with their building, and from making gas.

(*b*) 1 Cr. & Phil. 283.

(*c*) See Treatise, p. 248.

(*d*) 10 Beav. 75; and on appeal,
2 Phil. 209, and 11 Jurist, 73.

CHAPTER VI.

Injunctions in Aid of specific Performance, and to restrain Breach of Trust or Confidence.

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| 1. <i>Injunctions in Aid of Specific Performance of Agreement to purchase Land.</i>
2. <i>Injunction to restrain Breach of Covenants on Leases.</i>
3. <i>Of the Jurisdiction to interfere by</i> | <div style="text-align: center;">◆</div> <i>Injunction when the Agreement cannot be performed as a Whole.</i>
4. <i>Of Mandatory Injunction.</i>
5. <i>Injunctions to restrain Breach of Trust.</i>
6. <i>Injunctions to restrain presenting to a Benefice.</i> |
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1. IN a case of *Turner v. Wright (a)*, where the bill was filed by a purchaser against a vendor for specific performance, the doctrine of *Spiller v. Spiller (b)* was acted upon, although that case was not cited. The validity of the contract being questioned, the Master of the Rolls said he would not then decide on its validity; and as to the injunction to restrain the defendant from selling or letting, a purchaser *pendente lite* would take subject to the rights of the plaintiff.

2(c). Although a covenant may not be held to run with the land, so that the assignee of the covenant would not at law be affected, yet if he had at the time of his purchase notice of the covenant, he would be in equity affected so as to be restrainable from committing a breach of it. This was decided in *Mann v. Stephens (d)*, where A. being

(a) 4 Beav. 40.

(b) 3 Swan. 556; see Treatise, 252.

(c) See Treatise, p. 255.

(d) 15 Sim. 377; affirmed by the Lord Chancellor, 13th Nov. 1847, *ibid.*; and see 13 Jurist, 89, note *. See also *Tulk v. Moxhay*, 13 Jurist, 89.

seised of a house and land, sold the house to B., with a covenant that no building should be erected on the land; afterwards he sold the land to C., and took a counter covenant from him. After mesne conveyances the house became vested in D. and the land in E., but E. had notice of both covenants; it was held that, on that ground, E. was properly restrained from building in breach of the original contract.

In cases of excessively oppressive covenants equity will not interfere, but will leave the covenantee to his remedy at law. Thus where, in a lease of mines, a covenant was introduced, that if the lessor should *at any time* before the expiration or sooner determination of the lease give to the lessee notice of his desire to take all or any part of the machinery, stock in trade, implements, &c. in or about the mines, the lessee should deliver them up, the lessor paying the value of them, to be settled by arbitration: the Court said this was a covenant consistently with which it did not see how the lessee could work the mines to advantage, and so injurious and oppressive to the lessee, that on a bill for specific performance by the lessor, praying an injunction to restrain the lessee from selling or removing the articles mentioned in the notice that the lessor had given, pursuant to the covenant, the Court refused the injunction (e).

3. It is to be observed on the cases of *Kimberley v. Jennings*, *Kemble v. Kean*, and *Baldwin v. The Society for the Diffusion of Useful Knowledge*(f), that in those cases the bill was for specific performance as well as for an injunction; and in a later case (*Rolfe v. Rolfe*(g)), the Court took that distinction, and held that where there is a positive agreement incapable of being specifically performed, and a negative agreement, the bill praying only an injunction, the Court will grant it.

(e) *Talbot v. Ford*, 13 Sim. 173.

(g) 15 Sim. 88.

(f) See Treatise, p. 256 *et seq.*

Two other cases remain to be noticed on this subject, *Hills v. Croll* (*h*), before Lord Lyndhurst, C., and *Dietrichsen v. Cabburn* (*i*), before Lord Cottenham, C. In *Hills v. Croll* the plaintiff agreed to supply the defendant with certain acids, and the defendant agreed to purchase the acids from the plaintiff, and from no one else. After this agreement had been acted upon for some time, the defendant departed from it, and purchased acids from other persons than the plaintiff. The plaintiff then filed a bill praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids otherwise than from the plaintiff. On a motion for an injunction, which was refused, the Lord Chancellor expressed himself thus:—"There is a stipulation on the part of Hills that he will supply the acids, and there is a stipulation on the part of Croll that he will purchase acids from Hills, and from no other person. Has the Court any power to compel Hills to fulfil his part of the agreement? Can the Court order him to continue the manufacture of acids, or to purchase them elsewhere, for the purpose of supplying the defendant? It is clear, I apprehend, that the Court has no such power. In the case of *Colman v. Morris* (*k*), Mr. Colman was restrained from writing for any other theatre, the Court inferring that that would compel him, or have a tendency to compel him, to write for the Haymarket theatre; but in this case the Court has no power to compel the plaintiff to supply the defendant with acids, by ordering him not to supply any other person: that is not the agreement, nor was it ever intended that it should be the agreement; therefore it is clear that the Court cannot, either directly or indirectly, compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden in Ireland (*l*), that unless the Court can decree specific performance of the whole of a contract, it will not interfere to

(*h*) 2 Phil. 60; 9 Jurist, 645. (*k*) 18 Ves. 437.

(*i*) 2 Phil. 52; 10 Jurist, 601. (*l*) *Gervais v. Edwards*, 2 Dru. & War. 80.

enforce any part of it. When, therefore, this cause comes to a hearing, the Court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant. If it cannot do this at the hearing, it follows of course that it will not do it in the meantime upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed."

In *Dietrichsen v. Cabburn* the defendant agreed to employ the plaintiff as his wholesale agent for the sale of certain oils, and to supply him for that purpose with oil at a discount of 40 per cent. on the current retail prices, and not to sell the oil to any other person for resale at a higher rate of discount than 25 per cent. And the plaintiff agreed to act as the wholesale agent of the defendant, and to pay him for the oils. The plaintiff performed his part of the agreement; but the defendant did not perform his part, supplying other persons than the plaintiff with oils at a higher rate of discount than 25 per cent. A bill was filed not praying in terms specific performance, but praying that which was equivalent, an account and payment of the profits made by the defendant by sales made in violation of the contract, and an injunction. To this bill a demurrer was put in and over-ruled. Lord Cottenham, in dealing with this case, did not at all repudiate the doctrine, that if an agreement cannot be performed in the whole, it will not be performed in part. But his Lordship put the case upon quite another ground, viz. that the jurisdiction of the Court to restrain by injunction an act which a defendant is by contract in duty bound to abstain from, is not confined to cases where the Court has jurisdiction over the acts of the plaintiff. "If," said his Lordship, "the bill states a right and title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which

cannot be otherwise brought under the jurisdiction of a Court of Equity."

Such is the state of the authorities on this question, and the learned reader will of course draw from them his own conclusions. I submit, however, that the balance of authority and the weight of reasoning on principle, are in favor of the doctrine, that where there is the sort of double agreement that is found in the cases cited, what equity will look at is, whether the negative agreement is binding upon the defendant. If it is, the claim of the plaintiff to be protected against the breach of it will be enforced by injunction; and that, whether the bill is or is not as well for specific performance of the positive agreement, as for an injunction to restrain the breach of the negative agreement.

4. On the doctrine of *mandatory injunctions* (*k*) several cases have lately been decided.

In *The Great North of England, Clarence, and Hartlepool Junction Railway Company v. The Clarence Railway Company*, (*l*) the principal question between the parties was upon the construction of the act of parliament under which the plaintiffs claimed to act,—whether, assuming that the plaintiffs had a right to make a bridge, pursuant to a certain plan, over the defendants' railway, no part of the permanent supports of such bridge being intended to rest upon the defendants' land, the plaintiffs had a right, by way of temporary easement, to erect poles and other temporary constructions upon land adjacent to the defendants' railway, and to pass and repass across such railway, doing no vexatious acts, compensating for all damage, and not interfering with the regular traffic of the defendants' railway. The defendants, in order to prevent the plaintiffs from so temporarily using their land, had built up a wall which effectually prevented the plaintiffs from carrying on

(*k*) See Treatise, p. 260 *et seq.*

(*l*) 1 Coll. 507.

their works; and the bill prayed an injunction to restrain the defendants from continuing to maintain such wall, and from preventing the defendants from making their bridge, &c. In effect therefore the bill sought for an order to compel the defendants to remove their wall. The Court refused to grant the injunction until satisfied, by the opinion of a Court of law, that the plaintiffs had a legal right to build the bridge, and also a legal right to use the defendants' lands by way of temporary easement. But the Court of Exchequer having certified that the plaintiffs had both such legal rights, the Lord Chancellor, supporting the view of Knight Bruce, V. C., that it was no objection to the injunction that it was in effect of a mandatory character, made the order nearly in the terms of the prayer of the bill. To the same effect is *Lord Mexborough v. Bower (m)*, in which an injunction was granted to restrain the defendant (who had cut certain channels from one coal field into another, in derogation of an agreement with the plaintiff) *from permitting the communication to continue open*.

And here may also be mentioned two cases of *Whittaker v. Howe(n)*, and *Taylor v. Davis(o)*. In the former, a motion was made to restrain the defendant, a solicitor, who had sold his business to the plaintiff, and notwithstanding kept possession of books belonging to such business, from detaining and keeping possession of the books, &c. *from the chambers of the plaintiff, and from permitting the same to remain away from the office of the plaintiff.*" Lord Langdale at first made no order upon the motion as to the retention of papers, not it would seem from any doubt of the jurisdiction, but because the defendant's counsel made an offer which, if acted upon, would have rendered the injunction unnecessary; but he afterwards made the order. (*p*)

Taylor v. Davis was a case in which one partner hav-

(*m*) 7 Beav. 127.

(*n*) 3 Beav. 333.

(*o*) 3 Beav. 333, n. (*e*).

(*p*) See 3 Beav. 395, note.

ing, contrary to a covenant in the partnership deed, abstracted *a partnership book* from the counting-house of the firm, an injunction was granted, and continued at the hearing of the cause, restraining him *from continuing to violate the covenant*.

5. (q) As it is a breach of trust in a trustee to exercise any of the legal powers which he may have as such trustee, except for the legitimate purposes of the trust, a trustee attempting so to do may be restrained. Thus, where the indorsee of a bill, indorsed to him without consideration, for the purpose of recovering upon it against the acceptor, for the benefit of the drawer, attempted to bring an action upon it against the drawer, a demurrer to a bill for an injunction against his proceeding in the action was overruled (r).

Nor will a person filling a fiduciary character, such as that of secretary to a loan society, where his duty is to hand over the funds collected by him to the treasurer, be allowed to retain them in satisfaction of a claim for arrears of salary. If he attempts to do so, an injunction will be granted to restrain him from receiving the funds, leaving him to his separate remedy for his salary (s).

A covenant by an articulated clerk to a solicitor, that he will not, during nor after the expiration of the term of his articles, be professionally concerned for any persons who had been, or should from time to time thereafter become, the master's clients, has been held recently not to be so far in restraint of trade as to prevent the Court from granting an injunction to restrain the clerk, after the expiration of his articles, from acting for persons who had been clients of the master during the articles; and that although, by the terms of the agreement, the master might put an end to the period of the articles at any time upon one week's notice (t). An appeal was presented in this

(q) See p. 266 *et seq.* of Treat.

(r) *Balls v. Strutt*, 1 Flare, 146.

(s) *Shaw v. Hill*, 9 Jurist, 821.

(t) *Nicholls v. Stretton*, 7 Beav. 42.

case, and a case at law directed. An action on the covenant was brought, the result of which was to support the decision of the Master of the Rolls(*u*). It may be thought that this case goes much further than any of the preceding cases upon agreements in restraint of trade, as by the terms of the covenant the defendant was restricted from being employed by any persons whatsoever who might at any time during the whole life of the covenantee become his clients,—whether the covenantor acquired his knowledge of them through his connexion with the covenantee or not. In *Whittaker v. Howe*(*x*), where an injunction was also sustained for enforcing the performance of a covenant by Howe not to practise as a solicitor in Great Britain, although the circle within which the restriction was to operate was very large, the period was limited to twenty years. In that case, the defendants had sold their business of solicitors to the plaintiff, with a stipulation, that after a certain period neither of the defendants “should practise as solicitors or attornies in any part of Great Britain for the space of twenty years, without the consent of Whittaker” (the plaintiff). Howe, one of the defendants, committed a breach of this agreement, by taking chambers near the original place of business that he had occupied, and making demonstrations of commencing practice; and Lord Langdale held the restraint, upon the authorities, not unreasonable, and granted an injunction restraining the defendant from practising in any part of Great Britain.

6. Upon the exercise of the jurisdiction to restrain presenting to a benefice (*y*), there is another case of *Wyvill v. Bishop of Exeter*(*z*), where the plaintiff claimed, as a residuary devisee under the will of the owner of an advowson, the right to present on a vacancy that had occurred, but her trustee refused to present; and one of the defendants claimed the presentation under an alleged con-

(*u*) *Nicholls v. Stretton*, 11 Jurist, 1008.

(*x*) 3 Beav. 383.

(*y*) See p. 277 of the Treat.

(*y*) 1 Price, 292.

tract for purchase of the advowson from the testator; and the purchaser insisting on his purchase, and accounting for his delay by reason of unremoved objections to the title; and the bishop threatening to take advantage of the lapse, the Court, thinking the defendant had lost the benefit of the presentation by reason of his delay, directed the plaintiff's trustee to present within a given time, and restrained the bishop in the meantime.

CHAP. VII.

Injunctions between Partners.

THE doctrine of *Marshall v. Colman* (a) has lately been laid down as settled in a case of *Smith v. Jeyes* (b).

(a) 7 Ja. & W. 260; and see Treat. 281.

(b) 4 Beav. 503.

CHAPTER VIII.

Injunctions relating to Canal, Railway, and other Public Companies.

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| 1. Exception to the General Rule, that a Company exceeding its Powers will be restrained. | 4. Of Agreements between Parties as to their Conduct in Proceeding before Parliament. |
| 2. Of the Effect of Laches. | 5. Injunctions to restrain Companies from proceeding to alter their Constitution. |
| 3. General Principle on which the Court acts on interfering. | 6. Case of <i>Goodman v. De Beauvoir</i> . |
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1. IT has been stated in the Treatise (a), that generally a company exceeding the powers given to it by the legislature will be restrained; and this general principle remains undisturbed by more recent cases. But where a company entered upon a man's land, and dug a trench thereon, not strictly pursuing its powers, but it appeared such trench was merely to mark out an anticipated line of railway, and none of the soil was removed from the land, and the company never did anything more, and swore that they did not intend to go any more on the land, the Court refused to make any order, even as to costs, saying that the mischief, if any, having been done, there could be no use in an injunction. It must be observed that, in this case, the plaintiff did not file his bill till nine days after the injury had been discovered by him, and fourteen after it had ceased. The case is obviously *sui generis*, and neither establishes nor controverts any general principle (b).

(a) P. 285 *et seq.*

(b) *Fooks v. The Wiltshire Railway Company*, 5 Hare, 199.

2. On the effect of laches on the rights of parties to obtain or dissolve injunctions, the following cases, confirmatory and explanatory of the doctrine of those referred to in the Treatise (c), have been since decided: *Illingworth v. Manchester and Leeds Railway Company* (d), and *Bickford v. Skewes* (e).

To these may be added the more recent case of *Bridson v. Benecke* (f), upon a patent right, in which an injunction was refused on that ground, although the case was such that the Court intimated that, consistently with the principles laid down by Lord Eldon (g), it would, if there had not been delay, have been disposed to grant an injunction, pending the trial of the legal right. The plaintiff had been in possession for eleven years, and had succeeded in an action against another person, in which the title had been impeached. He was aware of the alleged infringement in January, 1848, and had an inspection of the defendant's machinery. In April he gave notice to the defendant that he should proceed against him, and had even a bill prepared in May. From that time to December he took no steps, not, however, doing any act to waive his claim; and in December he filed his bill, and moved on the 11th of January. The Court said the plaintiff might, by using proper diligence, have so acted that an injunction should not, or should not materially have injured the defendant; he had not so acted; and by reason of his delay the injunction was refused, with liberty, however, to renew the motion, if the defendant in any way impeded the speedy trial of the right.

3. The principles laid down in *Attorney-General v. Corporation of Liverpool* (h) are exemplified in a very marked manner in a case of *The Clarence Railway Com-*

(c) P. 294.

(d) 2 Rail. Cas. 187.

(e) Webs. Pat. Cas. 211.

(f) Rolls, 9th Feb. 1849, MS.

(g) See the cases cited in the Treatise, p. 222, n. (m).

(h) 1 Myl. & Cr. 171; and see the Treatise, pp. 297, 298.

pany v. The Great North of England, &c. Company (i), in which the Court, holding the legal title doubtful, and therefore fit to be tried at law, sustained an injunction in part, and dissolved it to the extent of enabling the defendants to complete a contract, which, if not completed forthwith, they might be wholly unable to complete after the determination of the legal right (k).

4. The question whether an agreement between parties with respect to their conduct as to proceedings on bills before parliament, or under acts of parliament, will be enforced by injunction, was partly raised in *Lord Petre v. The Eastern Counties Railway Company* (l). It has received a final determination in *The Stockton and Hartlepool Railway Company v. Leeds and Thirsk Railway Company* (m). In that case the defendants had agreed not to oppose a certain bill before parliament, and afterwards attempted to oppose it. The question was whether they should be restrained; and the Vice-Chancellor of England, and on appeal the Lord Chancellor, held that there was no doubt on the subject as to jurisdiction, and supported an injunction.

5. In reference to the question considered in *Ware v. Grand Junction Waterworks* (n), must be mentioned the case of *Ward v. The Society of Attornies* (o), in which the Society of Attornies, incorporated by charter, was restrained from conveying the property of the society to new trustees, and from surrendering the charter into the hands of the crown, for the purpose of obtaining a new charter for objects differing from those of the original charter; some of the members not consenting to the proposed surrender

(i) 2 Rail. Cas. 763.

(k) See also *Cory v. Yarmouth and Norwich Railway Company*, 3 Hare, 593.

(l) 1 Rail. Cas. 462.

(m) 2 Phil. 666, and 12 Jur. 713, 786.

(n) 2 Russ. & Myl. 470; and see p. 304 of the Treatise.

(o) 1 Coll. 370.

and change, and there being no specific power contained in the original charter, enabling a majority to change the interests of the minority (*p*).

6. Before concluding this chapter, it may be well to mention a case of considerable importance, apparently extending the jurisdiction of the Court, though in reality only applying one of its well known principles. In *Goodman v. De Beauvoir* (*q*) one question was, whether, if a clause in an act of parliament directs that on persons, named in a warrant of the Speaker of the House of Commons, petitioning the Court for payment out of Court of the monies named in such warrant, the Court *shall* direct the money to be paid, using only imperative words, with nothing on the face of the act to qualify them, such clause is altogether binding on the Court; and Sir L. Shadwell, V. C. E., held that it is not. His Honor held that though the words were imperative, and there was no qualification on the face of the section, though the word stood absolutely “shall,” nevertheless, by the inherent authority in the Court to repress fraud, and to prevent false dealing, and to exercise a wholesome control over persons standing in the character of trustees, the section was not imperative on the Court in this sense, or to this extent, that the Court shall not look to the circumstances and see whether it ought or ought not to do that which the legislature has *primâ facie* commanded to be done; and his Honor was clearly of opinion that the Court had such authority, and decided accordingly, by refusing, as to payment of the money, to allow an order made for paying it out, to be acted upon.

The same jurisdiction was exercised in *Castendieck v. De Burgh* (*r*). The language of the Vice-Chancellor in *Goodman v. De Beauvoir* may at first sight give an im-

(*p*) See also *Parker v. Dunn Navigation Company*, 1 Deg. & Sm. 192.

(*q*) 4 Rail. Cas. 380.

(*r*) 4 Rail. Cas. 386.

pression that his Honor is asserting an inherent jurisdiction in the Court of Chancery to disobey a clear act of parliament in cases of fraud. But I apprehend that that was not the meaning of the Court, but that his Honor was treating the point as one of construction upon the equity of the statute, and so held that the legislature did not mean the clause to be imperative. At any rate, the assertion of any such paramount jurisdiction is not necessarily involved in the decision, which may be supported consistently with the subordination of the Court of Chancery to the authority of the legislature, on the ground explained in an early part of the original treatise(s), that the Court acts on the *person* proceeding, not on the Court of superior or co-ordinate jurisdiction. The orders in the two cases above cited were not properly orders in defiance of the direction of the legislature, but orders on the *persons*, staying them from availing themselves of the benefit of the orders made in their favor. For it will be observed by the learned reader, on examination of the cases of *Goodman v. De Beauvoir* and *Castendieck v. De Burgh*, that in both cases the order for payment had been made; so that what the legislature directed to be done had been done, and then, and not till then, did the Court interfere by injunction, to restrain the person, who had obtained the order for payment, from receiving the monies ordered to be paid to him (t).

(s) See p. 96 of the Treatise.

(t) I think it right to apprise the learned reader, that he will not find mention in this chapter, of all the cases in the books, in which injunctions have been applied for on behalf of or against companies, as in many of the cases the question has been purely one of construction, and that being

determined, the granting or refusal of an injunction has been a simple matter of course. I have confined my selection of cases to those in which, as I understand them, some point purely or materially relating to the law and practice of injunctions, has been involved.

CHAPTER IX.

Injunctions in Matters of Bankruptcy.

THE question of the jurisdiction of the Court of Review, since the 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, to enjoin against proceedings at law, was raised and much discussed in *Ex parte Van Sandau* (a). The point was not decided, as the injunction granted was discharged upon other and very special grounds.

CHAPTER X.

Injunctions to remove Outstanding Terms and other legal Impediments.

ALTHOUGH the Court will at the proper time restrain the setting up of a term in an action to try the title; yet if in such an action the plaintiff at law has actually recovered by the aid of a term, even though he led the defendant to suppose he meant fairly to try the legal title, and the production of the term was a surprise upon him, the Court will not on that ground set aside the judgment at law (b).

(a) 1 Phil. 445.

(b) *Master of Clare Hall v. Harding*, 6 Hare, 273.

CHAPTER XI.

Of Injunctions in Interpleader Suits.

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| 1. <i>Of dissolving the Injunction in an Interpleader Suit, and of the course of proceeding generally.</i>
2. <i>Of the Affidavit of no Collusion, and</i> | <i>the Terms on which the Suit sustainable.</i>
3. <i>Construction of the Interpleader Act, 1 & 2 Will. IV. c. 58.</i> |
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1. A PLAINTIFF in an interpleader suit ought to use due diligence to get in the answers of the conflicting claimants, to enable the Court to put the disputed claim in a train of investigation. If, therefore, he obtains the usual injunction, and, on one of the answers coming in, does not use due diligence to get in the other, the defendant answering is right in moving to dissolve. But if, after the notice of motion, the other defendant's answer comes in, making a claim, the Court will not dissolve the injunction, or order the money paid in by the plaintiff to be paid out to the first defendant, but will continue the injunction, and put the disputed claim in course of determination (*a*). The costs in such a case were reserved.

But the defendant who has answered is not entitled, as a matter of course, to dissolve the injunction, because the other has not, for the Court is not then in a position to dispose of the matter. The proper course for the Court, is either to give the plaintiff further time to get in the second answer, or to take the bill *pro confesso* against the non-answering defendant; or, if the plaintiff has not entitled himself to that indulgence, then to dismiss the bill. It is clearly irregular, until all the answers are in, to refer the disputed claim to the Master (*b*).

(*a*) *Townley v. Dean*, 3 Beav. 213.

(*b*) *Masterman v. Lewin*, 2 Phil. 182.

2. It has been stated as the practice (c) that an interpleader bill must be accompanied by an affidavit of no collusion. If the bill is filed by the officer of a company on behalf of the company, the affidavit must go, not to there being no collusion between the plaintiff and the defendants—the plaintiff being merely nominally so—but to there being no collusion between the company and the defendant (d).

If a bill of interpleader is filed in respect of a sum of money on which interest is recoverable at law, the plaintiff ought by his bill to offer to pay the interest (e).

3. It has been decided that the Interpleader Act, 1 & 2 Will. IV. c. 58, does not apply to cases where the conflicting claims turn upon an equitable question. Where, therefore, a ship and cargo were in the possession of the sheriff, and the contest was between the execution creditor and an assignee, to whom the assignment had been made before the cargo was on board the ship, the Court considered the question as fit to be decided in equity, because an assignment of prospective cargo, though bad at law, might be good in equity. Under these circumstances the Court restrained proceedings at law, taken under a judge's order made under the Interpleader Act (f).

(c) See p. 325 of the Treatise.

(e) *Ibid.*

(d) *Bignold v. Audland*, 11 Sim. 23.

(f) *Langton v. Horton*, 3 Beav. 464.

CHAPTER XII.

Of the Jurisdiction in general to grant Injunctions to stay wrongful Acts of a special nature.

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| 1. <i>Of unintentional Injury to Rights of Property.</i>
2. <i>General Principle on which the Court proceeds in restraining or re-</i> | fusing to restrain the Exercise of disputed Rights.
3. <i>Injunctions to restrain Sales.</i> |
|---|---|

1. **WHATEVER** may be the doctrine at law, it seems that it is not the doctrine of equity, that, if a person has unintentionally done an act injurious to the right of property of another, he is on that ground not amenable to the process of the Court. In the case in which this point was raised (*a*), the plaintiff, a patentee, had brought an action against the defendant, and the Court of Exchequer had held that there was no *direct* infringement, because the defendant had not used the specific substance which *eo nomine* was the subject of the patent; and there was no *indirect* infringement, because, although the defendant had used two substances combined which produced the patented substance, he was not aware that they would form that substance (*b*). After this the plaintiff moved in the suit in equity for an injunction, and the defendants relied on the determination of the Court of common law. Sir L. Shadwell, V. C. E., expressed a strong opinion against the decision at law; and it was said that in the case of *Stevens v. Keating*, Lord Cottenham, C., had also disapproved the doctrine of *Heath v. Unwin* (*c*). Under all the

(*a*) *Heath v Unwin*, 15 Sim. 552.

(*c*) 2 Phil. 333, no observation on

(*b*) *Ibid.*; and see 13 Mees. & Wels. 583. this point is to be found in the Report.

circumstances, however, no order was made: the bill was retained for twelve months, with liberty to the plaintiff to bring an action. It must, in this state of the authorities, be considered undecided whether, when a legal right is invaded in ignorance of the fact of the invasion, an injunction will be granted. In support of the view taken by the Court of Exchequer, it is to be observed, that if equity will relieve generally against the consequences of a mistake of fact, as it unquestionably will, it would seem to follow that it ought not to punish by its prohibitory process an act done in ignorance of, or under mistake as to, the consequences of that act. On the other hand, if another is in possession of and uses profitably my money, believing it to be his own, unquestionably he will be compelled to account to me for the whole; and it may be asked, what difference there is between possessing and using my money, or possessing and using my invention, if by such possession and use money is made.

2. The proposition stated in the Treatise (*c*), that where the Court has strong doubts whether the legal right will be supported in a Court of law, it will not grant an injunction, hardly perhaps states strongly enough the principle on which the Court proceeds, which is that, wherever the legal right is doubtful, it must be tried at law; and that all the Court has to do in the meantime is to protect the existence of the right in dispute for the party who shall appear ultimately entitled to it, doing as little injury as possible to either party; and for that purpose maintaining or refusing wholly or partially an injunction, according as the balance of inconvenience lies on one side or the other (*d*).

(*c*) P. 330.

(*d*) See *Bacon v. Jones*, 4 Myl. & Cr. 443; *Kemp v. London and Brighton Railway Co.*, 1 Railw. Cas. 507, and the cases cited in the Treatise, p. 208,

n. (*m*); also *Clarence Railway Co. v. Great North of England Junction Co.*, 2 Railw. Cas. 763; and *Cory v. Yar-mouth and Norwich Railway Co.*, 3 Railw. Cas. 524.

In *Ridgway v. Roberts* (*e*) the dispute was as to the right of dealing with a ship and her cargo. The Court held that if the plaintiff had any title, it was legal; that title was disputed; and what the defendant had done—which was to take forcible possession of the ship—was therefore trespass, if any offence at all. The Vice-Chancellor Wigram would not grant the injunction, because that would in effect enable the plaintiff to defeat, or at least so to embarrass the defendant's title, as to make it worthless; neither would he simply refuse the injunction. His Honor threw out that the Court might take possession of the ship, to preserve her for the benefit of the party who should be found entitled. Eventually no order was made affecting the possession of the ship, the intimation of the Vice-Chancellor being apparently sufficient to induce both parties to abstain from any dealings with her; and the motion stood over, the defendant undertaking to bring an action of trover for the ship, with liberty to either party to apply for possession or use of her. Nothing in the nature of a threat or danger of injury incapable of compensation by damages was alleged or shown; if any such case had been made, the Vice-Chancellor thought an injunction might be granted. This dictum is quite consistent with the authorities relating to injunctions against trespass (*f*).

3. Under this head may be noticed a somewhat singular case, in which an injunction was granted at the suit of a married woman, entitled to separate estate, to restrain the husband from disposing of or intermeddling with such separate estate (*g*). In the case referred to, leasehold houses and personal chattels, and some money in a savings bank, were settled to the separate use of the plaintiff. The husband, one of the defendants, took possession and disposed of some of the chattels, and entered into and kept

(*e*) 4 Hare, 106.

(*g*) *Green v. Green*, 5 Hare, 400, n.

(*f*) P. 183 *et seq.* of the Treatise, and the cases there cited.

possession of one of the houses, and threatened to take possession of the money in the savings bank. An injunction was granted to restrain him from doing these acts, and in particular from *continuing* in possession of the house. A motion to dissolve was refused by the Vice-Chancellor of England. The objection was taken as to that part of the order which restrained the husband from continuing in possession of the house,—that it amounted, in fact, to a divorce *à mensâ et thoro*. To this the Court answered, that if it was so, the husband had his remedy in the Ecclesiastical Court. Perhaps a more solid objection to that part of the order would have been, that it was, in fact, an equitable ejectment.

PART III.

OF THE PRACTICE IN MATTERS OF INJUNCTION.

CHAPTER I.

OF THE MODE OF OBTAINING INJUNCTIONS.

SECTION I

As to Injunctions to stay Proceedings at Law.

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| 1. When the common Injunction may be obtained.
2. As to advancing Proceedings which would delay the common Injunction.
3. Exceptions to the Rule, that an Injunction against Proceedings at | Law cannot be obtained except on Bill filed.
4. When a special Injunction to stay Proceedings at Law obtainable.
5. Of restraining Orders, Distringas, and Interim Orders. |
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1. IT is stated in the Treatise (*a*), that a motion for the common injunction for default of appearance or answer, may be made on any day whether in or out of term. It should be added, as well in the long vacation as at any other time, wherever and whenever in fact the Court is sitting; and so it was held on a motion to discharge orders nisi and absolute, obtained in the long vacation, for irregularity (*b*).

(*a*) Page 348.

(*b*) *Lane v. Barton*, 1 Phil. 363.
See also *Reece v. Humble*, 10 Sim. 117,
and *Lord Harborough v. Wartnaby*,

1 Phil. 364. But that there is an exception to the rule laid down in the last case, see *Robertson v. Skelton*, 10 Beav. 197.

2. The principle acted upon in advancing a demurrer is acted upon in other cases when the effect of delay would be injury to the plaintiff. Thus, by the practice of the Court, a plaintiff cannot refer exceptions to the answer for insufficiency, before the expiration of eight days, (except in a case of election). The consequence would be, under given circumstances as to the period fixed for the trial at law, that the plaintiff might be unable to obtain the common injunction in time to stay trial. In such a case the Court will refer the exceptions *instanter*. It is not, however, of course to do so, but the plaintiff must make a case, showing that he would be seriously prejudiced by the delay; that he is advised that he has good ground for equitable relief; and that he makes the application *bonâ fide*, and not for delay (*c*). So if exceptions are shown for cause against dissolving an injunction on the same day they are filed, the Court will still refer them *instanter*, notwithstanding the 16th order of 1845 (*d*).

3. Within these exceptions has been held to fall the case of a creditors' suit, where both the preliminary decree for accounts, and a decree on further directions had been made, and the plaintiff had been found a creditor of the testator to the amount of 1100*l.*, but no order was made for continuing an injunction that had been made in the suit restraining the executor from getting in the assets. The executor afterwards brought an action against the plaintiff for a much larger sum than 1100*l.* alleged to be due from him. The Court granted an injunction, although it was contended that the final decree having been made without continuing the injunction, it was gone. No authorities appear to have been cited (*e*).

(*c*) *Muggeridge v. Sloman*, 9 Beav. 314; *Teesdale v. Twindell*, 9 Beav. 491.

(*d*) *Hughes v. Thomas*, 7 Beav. 584.
(*e*) *Oldfield v. Cobbett*, 5 Beav. 132.

4. If on a bill being filed by some shareholders of a company on behalf of themselves and all others, the common injunction has been obtained, restricting the defendants in the usual form from proceeding against *the plaintiffs*, that will bind the defendants only in regard to the plaintiffs actually *named* on the record. But in that case, a special injunction, founded on the common injunction, may be obtained on special application, to restrain the defendants from proceeding against any of the shareholders represented, it being open, on such a motion, to the defendants to show special grounds why the special injunction should not be granted (*f*).

5. Before concluding this subject, must be noticed the effect of the 4th and 5th sections of the 5 Vict. c. 5. The 4th section gives to the Court of Chancery power to restrain the Bank or any other public company on motion or petition, without bill filed, from permitting the transfer of stock, or from paying dividends. The 5th authorizes the Court to issue a writ of *distringas*, in the form set out in the schedule to the act, in substitution of the *distringas* formerly issuable out of the Court of Exchequer.

In a case of *Ex parte Amyot (g)*, the plaintiff having before the act sued out a *distringas* in the Court of Exchequer, let his *distringas* fall, by not filing a bill within the time required under the old practice after notice by the Bank. He then, after the act, filed a bill, and obtained an *ex parte* injunction or restraining order under the 4th section of the act. It was held that his restraining order must be discharged on this ground, that having exhausted his remedy under the old practice, he could not afterwards avail himself of the remedy given by the new statute. But where a party proceeding wholly under the statute, obtains a *distringas* under the 5th section, that does not, it would seem, preclude him from afterwards obtaining a restraining

(*f*) *Lund v. Blanchard*, 4 Hare, 290. (*g*) 1 Phil. 130, n. (*a*).

order under the 4th (*h*); the remedies are cumulative. A restraining order under the 4th section continues in force until discharged. It does not fall merely on a bill being filed; but it would seem that the statute did not intend to confer a new jurisdiction on the Court, otherwise than for interim purposes, and therefore that in order to sustain the restraining order, a bill should be filed in due time (*i*).

It is also proper to notice the modern practice which has grown up of granting what are termed interim orders. They are in fact temporary *ex parte* injunctions, which are granted when the plaintiff not showing quite a case for an *ex parte* injunction without more, shows a case for giving short notice, and for protection in the mean time. The interim order is therefore an injunction obtained *ex parte*, to be in force till the injunction has been disposed of on notice. It is generally accompanied by putting the plaintiff on terms to give an undertaking for any damage done to the defendant by the interim order.

SECTION II.

As to obtaining Special Injunctions.

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| 1. <i>As to the Exceptions to Rule that an Injunction cannot be obtained except on Bill.</i> | 3. <i>What requisite to support an Ex parte Application.</i> |
| 2. <i>Injunctions against Persons not Parties.</i> | 4. <i>Other Points.</i> |
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1. The cases of exception mentioned in the Treatise (*k*), to the rule that a special injunction cannot be obtained

(*h*) *Ex parte Marquis of Hertford*, 584; S. C. 1 Phil. 203.
1 Phil. 129.

(*k*) Page 364 *et seq.*

(*i*) *Re Marquis of Hertford*, 1 Hare,

without a bill, have been there mentioned, and the authorities have been referred to, because the learning, though obsolete, may not be without its use. At this day, however, the universal practice is to file a bill in or out of vacation. If the plaintiff wishes to move on notice, he may obtain leave to serve a notice of motion, upon the statement of counsel that subpœna has issued, and that a bill is prepared though not filed. Of course the bill must be filed before the motion is actually made (*l*).

2. An injunction was granted in a recent case where a receiver had been appointed and had let to A. as a tenant from year to year, A. agreeing to cultivate in a husband-like manner. A. being under notice to quit, was removing the hay and straw, &c. contrary to the custom of the country. He was restrained, although no party to the cause (*m*).

3. It has been stated in the Treatise, that it is the duty of a person coming with an *ex parte* application not to misrepresent the facts, and to state all the material facts (*n*), and if he does not, the injunction will be dissolved on that ground alone, even although he should afterwards show merits. To this may be added, that it is his duty to come quickly upon the discovery of his right, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make (*o*).

4. Where the very frequent course is taken of ordering a motion for an injunction to stand over, with liberty to the plaintiff to bring an action, and the plaintiff does not

(*l*) *Fosbrook v. Woodcock*, 12 Jur. 956.

(*m*) *Walton v. Johnson*, 15 Sim. 352.

(*n*) Treatise, p. 372; and see fur-

ther, *Hilton v. Ld. Granville*, 4 Beav. 130.

(*o*) *Barker v. North Staffordshire Railway Company*, 12 Jurist, 589.

proceed to bring any action, the defendant will be entitled to have the motion dismissed with costs (*p*).

Though in general a special injunction cannot be granted unless prayed, yet under special circumstances it may be done (*q*). And in a suit for foreclosure, if after decree the mortgagor being in possession commits waste, an injunction will be granted, although the bill does not pray it (*r*).

(*p*) *Perry v. Truefitt*, 6 Beav. 418.

(*r*) *Goodman v. Kine*, 8 Beav. 379.

(*q*) *Blomfield v. Eyre*, 8 Beav. 250.

CHAPTER II.

Extending the common Injunction to stay Trial.

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| 1. <i>As to the Affidavit of materiality.</i> | 4. <i>Form of the common Injunction.</i> |
| 2. <i>Effect of Delay in obtaining common Injunction.</i> | 5. <i>As to resisting the Motion on the ground of Answer being filed, and as to Insufficiency of the Answer.</i> |
| 3. <i>As to Affidavit being contradicted, and of the doctrine of Thorpe v. Hughes.</i> | 6. <i>Where Motion to extend made on amended Bill.</i> |
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1. THE rule that, in support of a motion to extend, the affidavit of materiality will not do, if made only by the plaintiff's solicitor, unless good reason is shown why the plaintiff did not make it, has been supported in a recent case (*a*).

2. In the same case, the plaintiff did not move to extend till the 2nd December, the trial being fixed for the sittings commencing on the 6th. It appeared that the action was brought on the 11th August; that the plaintiff from the circumstances must have known what was the cause of action, and nevertheless he did not file his bill till the 8th November; and even after that, he knew that proceedings were going on at law, and might have got the common injunction on the 17th November, instead of which he never moved for it till the 24th. Under these circumstances it was held that his delay would preclude him from obtaining an order to extend so near the time of trial, unless the answer was insufficient; and, the answer having been excepted to and found insufficient, the Vice-Chancellor looked into it to see whether the defendant had mis-

(a) *Scotson v. Gaury*, 1 Hare, 99.

conducted himself by evasion in his answer, in which case his Honor thought he might, perhaps, set off such misconduct against the dilatoriness of the plaintiff. The answer was substantially sufficient, though technically insufficient, and therefore the motion was refused.

It has been also held that an order to extend will not be made close to the time of the assizes, even on the terms of the plaintiff giving security for costs, if there has been gross delay (*b*).

3. With reference to the point discussed in the Treatise(*c*) in reference to *Thorpe v. Hughes* (*d*), may be noticed the recent case of *Ashby v. Jackson* (*e*) in which the case of *Thorpe v. Hughes* was cited, and its doctrine acquiesced in by the Court. It is to be presumed, however, from what is stated in the report of *Ashby v. Jackson*, that that case fell more properly under the rule in *White v. Steinwacks* (*f*), as it would seem that in *Ashby v. Jackson* the fact that the discovery would be of no use to the plaintiff in his defence at law, appeared upon the pleadings, if at all.

4. The pendency of proceedings before a judge at chambers to settle the pleas in an action is no ground for departing from the common form of an order to extend the common injunction, by inserting a direction that it shall be without prejudice to the plaintiff at law proceeding to complete the issue (*g*).

5. In reference to the rule, that the answer, in order to be used as an objection against an order to extend, must be filed on the preceding day, it may be stated that an allegation at the bar that the answer is drawn, and an undertaking to file it before the trial, is not a sufficient ground for resisting a motion to extend (*h*).

(*b*) *Stokes v. Wilson*, 12 Sim. 91.

(*c*) P. 378.

(*d*) 3 Myl. & Cr. 761.

(*e*) 6 Beav. 336.

(*f*) 19 Ves. 83.

(*g*) *Woodall v. White*, 3 Hare, 411.

(*h*) *Partridge v. Comings*, 7 Jurist,

1122.

The case of *Munnings v. Adamson* (i) has been overruled by a recent decision, *Scotson v. Gaury* (k); in that case the common injunction was obtained on the 24th November, and notice of motion given for the 2nd December to extend the injunction to stay trial, which was fixed for the sittings commencing on the 6th December; the answer was filed on the evening of the 1st December, and on the motion being made on the following day, the Court was asked, upon the authority *Munnings v. Adamson*, to look at the answer without exceptions, to see whether it was insufficient. The Vice-Chancellor Sir J. Wigram, after taking time to consider, said, "When the case was mentioned yesterday, I was strongly impressed with the belief that the practice of the Court had not been in accordance with the course which Sir Anthony Hart is reported to have taken in the case of *Munnings v. Adamson*. There are many other cases in the books in which the same reasons of hardship on the plaintiff in equity, and the same apparent necessity for the Court to look into the answer must have existed, as in the case of *Munnings v. Adamson*, yet in no other case does it appear that the Court ever took upon itself, without exceptions before it, to examine the answer and decide upon its sufficiency. I have referred to the cases of *Whitehouse v. Hickman*, *Ibbetson v. Booth*, *Bruce v. Webb* and *Bishton v. Birch*. I also find, upon inquiry, that the most experienced registrars have no knowledge of any such a practice as that which I am desired to follow upon the authority of *Munnings v. Adamson*. In addition to the cases which I have mentioned, I have been referred to that of *Thompson v. Byrom*, but I do not find that Lord Langdale in that case followed, or had occasion to follow, the precedent of *Munnings v. Adamson*. If it had appeared that it was the practice of the Court to do that which I am now asked to do, I should of course have been bound to follow that practice, but that certainly does not appear. Very serious

(i) 1 Sim. 510.

(k) 1 Hare, 99.

objections would in my opinion attend such a practice. If the plaintiff delivers exceptions, the defendant may put in a further answer, and give the discovery which is sought, and save his opportunity of immediately proceeding to trial. On the other hand, if the Court takes up the answer and merely says it is sufficient, without defining in what particulars it is so, which it cannot adequately do without exceptions being taken, there are no means within the practice of the Court by which the defendant can file a further answer, and thereby relieve himself from the injunction. Nor has he the means of combating the opinion of the Court upon the very question of the sufficiency of the answer. It was suggested that the Court might put the plaintiff upon the terms of filing exceptions *instante*, but he may not be able, even if willing, to do so in time to admit of a further answer being filed before the day of trial, in the meantime the action is restrained by the injunction. This is not just, unless the defendant is in some default." But in such a case, if the plaintiff will except to the answer, the Court will hear the application *instante*.

6. In *Stratford v. Lewis* (l) the same point that arose in *Simes v. Duff* (m) occurred again before the learned judge who had decided that case, and his Honor again made an order to extend, *Mellor v. Cresswell* (n) being cited.

Since the cases of *Mellor v. Cresswell* and *Howard v. Cliffe* (o), it has been held by Lord Langdale, M. R., in a case (p) where there was a common injunction obtained upon the answer being found insufficient; then an order to amend the bill without prejudice to the injunction; and then amendment of the bill accordingly; that an order to extend the common injunction to stay trial might be granted. The motion was made on the 3rd of July, and

(l) 8 Jurist, 484.

(m) 8 Sim. 270.

(n) 2 Myl. & K. 616.

(o) 3 Jurist, 817.

(p) *Archer v. Hudson*, 6 Beav. 474.

the commission-day appointed for the 12th. His Lordship appears to have considered the case as distinguishable from *Howard v. Cliffe*, as he observed, that if the authority of that case applied, he should refuse the motion. The report of *Archer v. Hudson* does not, however, state the grounds on which the Court distinguished it from *Howard v. Cliffe*.

And still more recently, in *Goddard v. Smith* (q), both *Mellor v. Cresswell* and *Simes v. Duff* being cited, the Master of the Rolls held that where an answer had been reported insufficient, and then the plaintiff obtained an order to amend, and that the defendant might answer the exceptions and amendments together, and at the same time obtained the common injunction, a motion to extend the injunction to stay trial was regular.

(q) 8 Beav. 41.

CHAPTER. III.

Of the Effect on Injunctions of Amendments, and of reviving an Injunction.

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| 1. <i>Effect on the common Injunction of Amending, and of applying for Leave to amend without Prejudice.</i> | 2. <i>Application of the third Order of 9th of May, 1839.</i> |
|--|---|

1. **IN** *Brooks v. Purton* (a) the Vice-Chancellor Knight Bruce, following *Ferrand v. Hamer* (b), appears to have considered the point in that case as settled independently of the second order of May, 1839. However that may be, the practice is now settled by that order; and accordingly is the case of *Warburton v. Blackwall Railway Company* (c); but it does not follow from that case, that the fact of amending the bill may not under circumstances afford ground for dissolving the common injunction, without answering, and independently of the merits of the case (d).

In *Wright v. King* (e), after the answers had been filed more than twelve months, a motion was made to the Court for leave to amend a bill *without prejudice to the injunction*; and it was held, that as the plaintiff was desirous to amend, with an adjunct, (viz. that the amendment should be without prejudice), over which the Master had no jurisdiction, the application was properly made to the Court, and not to the Master. In this case, neither the second order of May, 1839, nor the case of *Warburton v. The London and Blackwall Railway Company* (f), were mentioned. It is difficult, consistently with the latter case, to see why, in *Wright v. King*, the application should not

(a) 1 You. & Coll. C. C. 271.

(b) 4 Myl. & Cr. 143.

(c) 2 Beav. 253.

(d) *Brooks v. Purton* cited supra.

(e) 9 Beav. 161.

(f) 2 Beav. 253.

have been made to the Master, because it was unnecessary to have inserted in the order for liberty to amend, the words *without prejudice*, and therefore the common application, which was within the Master's jurisdiction, would have been sufficient. Probably all that the Court meant to say was, that if the plaintiffs desire their order to amend to contain the words *without prejudice*, the application must be made to the Court.

2. Before the third order of May, 1839, it had been held, that the tenth order of 1833, so far as regarded injunctions, did not apply, except to injunctions to be granted on original bills; consequently that the plaintiff could not have an injunction for default on an amended bill till five weeks after appearance in a town cause, and seven weeks in a country cause, if the amendment was made *after* appearance; but if the amendment was made *before* appearance, that rule did not apply (*g*).

But this construction of the order was in effect overruled in *Brooks v. Purton* (*h*), where it was held that the tenth order of 1833 included amended as well as original bills; and that the third order of the 9th of May, 1839, applied only to those cases where the equity for an injunction contained in the original bill having been effectually displaced by the answer, the plaintiff afterwards introduced a new case by amendment: it is in those cases only, therefore, that an affidavit of the truth of the amendments is requisite.

The tenth order of 1833 is discharged by the first general order of May, 1845. The third order of May, 1839, remains in force. By that order it appears immaterial whether the amendment is made before or after appearance; in either case, if the defendant makes default in pleading, answering or demurring within eight days after appearance, the plaintiff may have an injunction on his amended bill, on affidavit of the truth of the amendments.

(*g*) See p. 394 of the Treatise.

(*h*) 1 Cr. & Phil. 233.

CHAPTER IV.

*Of Breach of an Injunction and its Consequences.*1. *Of Service of an Injunction.*| 2. *What is a Breach.*

1. **AS** to what is sufficient service, generally an injunction ought to be served on the defendant personally, or on some person who by an order of the Court is substituted.

And where, before the orders of 26th October, 1842, the clerk in court of the defendant was served, without order, with an injunction, it was held that that was not good service, because the clerk in court was only the agent of the party to receive notice of the proceedings in the cause; but an injunction is extraneous to the cause, and not a proceeding in it. But, if the plaintiff cannot succeed in serving it on the defendant, and the defendant's solicitor refuses to accept service, service will be ordered on the solicitor (*a*).

2. Whether a defendant has committed a breach of a special injunction, is a mixed question of fact and of construction; and it need scarcely be observed that a defendant, having been enjoined from permitting a particular effect, capable of being produced by several causes, to be produced by a given cause, is not to be treated as guilty of a breach, merely because the effect has taken place, without proof connecting the effect with the particular cause. This was held in a case of *Dawson v. Paver* (*b*).

(*a*) *Kirkman v. Honnor*, 6 Beav. 400.

(*b*) 5 Hare, 424.

The point was simply one of evidence, and seems to have been almost too clear for argument.

It is a breach, after the common injunction has been extended to stay trial, to obtain a judge's order for changing the venue(c). And it is a breach of the common injunction restraining execution, if the defendant, having paid the money in dispute into the Court of law, proceeds after verdict to obtain a rule nisi to show why the money should not be paid out to him; for that is a step towards execution(d).

But if a motion to commit for breach of an injunction for commencing an action, has been refused by the Court below, and then, pending a motion in the nature of an appeal motion, the plaintiff pleads to the action, that is not waiver of his right to move to commit before the superior Court(e).

In *Wellesley v. Lord Mornington* (f) a motion was made to commit one Battley (who was Lord Mornington's steward) for cutting timber, &c. in defiance of an injunction granted against Lord Mornington-personally, without mentioning his servants and agents. Battley had notice of the injunction. Lord Langdale allowed an objection that the injunction being against Lord Mornington alone, it was no breach in Battley to do the acts enjoined, and refused the motion, but without costs(g).

In a recent case(h) the bill was filed by three shareholders of a company on behalf of themselves and the others, and the common injunction was obtained, running in the usual form to restrain proceedings by the defendants against the *said complainants*. The defendants put in their answer, and on account of its length and the extent of the transaction in question the plaintiffs obtained time for showing cause against dissolving the injunction on the

(c) *Pariente v. Bensusan*, 13 Sim. 522.

(d) *Brooks v. Purton*, 1 You. & Coll. C. C. 271.

(e) *Newman v. Ring*, 10 Jurist, 463.

(f) *Rolls*, 4 May, 1848, MS., and 12 Jurist, 867.

(g) See also on this point *Lewis v. Morgan*, 5 Price, 518.

(h) *Lund v. Blanchard*, 4 Hare, 290.

merits. In this state of things the defendants proceeded in their action against *others* of the shareholders not named as plaintiffs; and it was held that this was no breach, as the injunction only applied to the persons named as complainants, and could only, as an order of course, benefit the shareholders generally, so far as an order in favor of those assuming to represent the shareholders would benefit them. But the Court held that in such a case, having regard to the rule which admits of a numerous body being represented by a few of its members, a special motion to restrain proceedings against the shareholders represented, but not named, might be founded on the common injunction obtained in favor of the persons named; but on such a motion it would be open to the defendants to show any special circumstances by which they might be prejudiced if the injunction were granted, and against which the Court would protect them, if all the shareholders were named as plaintiffs.

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CHAPTER V.

OF THE PRACTICE ON DISSOLVING INJUNCTIONS.

SECT. I.

As to dissolving Injunctions to stay Proceedings at Law.

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| 1. <i>Of making absolute or discharging the Order Nisi.</i>
2. <i>Whether the Order Nisi can be dispensed with.</i>
3. <i>Of showing Exceptions for Impertinence as Cause against dissolving.</i>
4. <i>Practice as to dissolving or referring Answer for Insufficiency.</i>
5. <i>When Orders Nisi may be obtained and made absolute.</i> | 6. <i>As to dissolving Injunction against some of several Defendants; and as to Motion by some to dissolve against all.</i>
7. <i>Effect of a Demurrer being allowed.</i>
8. <i>Of reading Affidavits against the Answer, or in support of Allegations ignored by the Answer.</i> |
|--|---|

1. **THE** terms of the order nisi to dissolve the common injunction are, that the injunction is to be dissolved unless the plaintiff, his solicitor having notice, shall, on a day (named in the order) show to the Court cause to the contrary; and these terms were considered to be inconsistent with the allowance of any further time to the plaintiff to show cause. Therefore, where the answer was filed on the 30th May, and same day the defendant obtained and served an order nisi, the Court refused on the 2nd June (the day on which the cause was to be shown) to allow the plaintiff any further time, although the answer was of great length; so that it was manifestly out of all question that the two days could have been sufficient for the plaintiff to look into the answer to see whether exceptions should be taken to it (a); but this rule has been departed from in a late case, which seems undistinguishable from

(a) *Stanley v. Bond*, 5 Beav. 175.

Stanley v. Bond. In the case referred to, the plaintiff had been unable to obtain an office copy of the answer at the time when the defendant was entitled to move to make the order nisi to dissolve absolute, and time was given to the plaintiff to see whether he would show merits or exceptions for cause against dissolving (*b*).

2. The case of *Sharpley v. Perring* (*c*) was referred to in *Bordinave v. Wadeson* (*d*), in support of a special motion to dissolve at once the common injunction. The Court refused the motion, with expressions of want of confidence in the accuracy of the report of the case of *Sharpley v. Perring*, which, his Honor observed, was stated to be *ex relatione*, without stating by whom it was reported. It is to be regretted that the special circumstances in *Sharpley v. Perring* are not stated in the report. In *Bordinave v. Wadeson* there were no very special circumstances, and therefore *Sharpley v. Perring* was clearly no authority for departing in that case from the usual practice of first obtaining an order nisi. The observations of the Court in *Bordinave v. Wadeson* must be taken, however, to throw much doubt on the authority of *Sharpley v. Perring*, for even the limited doctrine, that in any case (except cases of the class of *Lacy v. Horneby* (*e*)) the order nisi can be dispensed with in proceeding to dissolve the common injunction.

3. In a very recent case the Vice-Chancellor of England held, that, since the 11th Order of 1841, exceptions for impertinence cannot be shown for cause against dissolving an injunction (*f*). His Honor said, "Under the New Orders of the Court, an answer cannot be referred generally for impertinence, but the matters alleged to be impertinent must be specified by way of exception. Why, then, may not the answer in this case be taken as an

(*b*) *Gibson v. Chayters*, 8 Beav. 167.

(*e*) 2 Ves. & B. 291.

(*c*) 8 Sim. 603.

(*f*) *Simeon v. Davis*, 12 Sim. 46.

(*d*) 1 Coll. 432.

answer, disregarding those parts of it which have been excepted to as being impertinent." If this decision was right under the Orders of 1841, it is so equally now under the 38th Order of 1845. But the professed reason of it seems open to this objection, that it does not answer the reason given in *Goodinge v. Woodham* (g), viz. that as an answer cannot be excepted to for insufficiency, if it is intended to refer it for impertinence, and as there must be a judgment upon the reference for impertinence before there can be a judgment on the insufficiency, and as exceptions for insufficiency may be shown as cause against dissolving, all proceedings necessarily preceding them must also be sufficient cause. If, in accordance with *Simeon v. Davis*, the answer is to be taken as an answer, disregarding those parts of it which are excepted to for impertinence, the result would be, that a motion to dissolve would be made upon statements in the answer, which may be afterwards successfully excepted to as insufficient.

4. As to the practice on references for insufficiency, the 16th General Order of 1845, sect. 25, is substituted for the 5th General Order of 1828.

The 16th Order of 1845, sect. 25, has not altered the practice as to referring exceptions instanter in injunction causes, although in the 5th Order of 1828 injunction causes are expressly excepted from the delay of eight days before referring, and are not so in the Order of 1845. The principle is this, that in an injunction cause the plaintiff is not, technically speaking, put to *refer* his exceptions at all, but his right is to show his exceptions as cause against making the order nisi absolute; and then the Court, to avoid giving unjust credit to the exceptions, instead of looking into them, makes the reference *mero motu*, or at the request of the defendant (h). The practice in other respects stated in this section seems also unaffected by the 16th Order of 1845.

(g) 14 Ves. 536.

(h) *Hughes v. Thomas*, 7 Beav. 584.

5. It has been settled that the Court is always open, and that as well in the long vacation as at any other time, both for granting and dissolving injunctions; and orders nisi and absolute to dissolve the common injunction, both obtained in the long vacation, were held regular (*i*).

6. The point referred to in the Treatise, p. 419, has lately been decided upon a review of the authorities, and it has been held that where there is a common injunction against several defendants, some who have answered may dissolve as against themselves before the answers of the others have come in; but they must first obtain the order nisi, and then proceed in the usual course to make the order absolute. The order nisi should also be taken expressly worded, so as to dissolve as against the particular defendants moving (*j*). In a recent case (*k*) an injunction had been obtained, and afterwards extended, to stay trial in a joint action; some of the defendants answered, and dissolved the injunction as against themselves; afterwards the others answered, but would not move to dissolve. Those who had dissolved as against themselves then moved to dissolve as against the other defendants, without serving those others with notice of the motion. It was held that, the action being joint, the interest must be presumed to be joint in the absence of any suggestion to the contrary; it was held also, on the authority of *Joseph v. Doubleday* (*l*), that some defendants may move to dissolve against all; and the plaintiff not suggesting that the absent defendants desired the injunction to continue, that notice to them was not necessary, and the injunction was accordingly dissolved.

7. On the same principle, it should seem, on which it is held, that if a bill is dismissed, an injunction granted on such bill falls with it, is founded the rule, that where an

(*i*) *Lane v. Barton*, 1 Phil. 363. Jurist, 956.

(*j*) *Lewis v. Smith*, 7 Beav. 470. (*l*) 1 Ves. & Bea. 497.

(*k*) *M'Gregor v. Conyngham*, 12

injunction has been obtained, and a demurrer to the whole bill is allowed, the injunction is gone, and that although leave is given to amend (*m*).

8. In *Forster v. Teward* (*n*), where the plaintiff showed for cause against making the common order nisi absolute, that the defendant had upon his answer been indicted for perjury, and that a true bill had been found against him, Lord Langdale, M. R., on the authority of *Clapham v. White*, held that insufficient cause.

On the question whether, where facts are alleged by the bill, and the answer simply ignores them, affidavits can be read in support of the bill, there has been much conflict of authority. In the case of *Ord v. White* (*o*) facts essential to the plaintiff's case were alleged in the bill, and by the answer neither admitted nor denied, but simply ignored. The Master of the Rolls thought (though it was not necessary to decide the point, as he granted the injunction irrespectively of the affidavits tendered by the plaintiff,) that in such a case affidavits may be read by the plaintiff to prove the allegations of the bill. The case of *Castellain v. Blumenthal* (*p*) was not cited in *Ord v. White*.

In *Barwell v. Barwell* (*q*) the defendant by her answer stated, as to certain facts, that she had *been informed and believed* it to be true, &c.; and *Ord v. White* was cited as an authority for reading affidavits on behalf of the plaintiff to contradict those statements in the answer. But Lord Langdale, M. R., refused to hear them, observing that no one ever doubted that affidavits are inadmissible, when the defendant distinctly states his belief. His Lordship referred to his dictum in *Ord v. White*, observing that he had not decided the point, and neither recalling nor reasserting the opinion that he had there expressed.

The case of *Edwards v. Jones* (*r*) seems to have settled

(*m*) *Schneider v. Lizardi*, 9 Beav.

461.

(*n*) 5 Jurist, 1031.

(*o*) 3 Beav. 357.

(*p*) 12 Sim. 47.

(*q*) 5 Beav. 373.

(*r*) 13 Sim. 632; 1 Phil. 501.

the point, although not upon an injunction motion. In that case, on a motion for a receiver, among other things, an affidavit was tendered by the plaintiff to prove the death of a particular person (the period of whose death was very material), the answer ignoring the fact of the alleged death. It was contended, on the authority of *Ord v. White* and other cases, that the affidavit was admissible; but the Vice-Chancellor of England held the affidavit inadmissible, and, on appeal, Lord Lyndhurst, C., affirmed the decision. "An affidavit," said his Lordship, "was offered to prove the fact that Howell Powell (the person whose death it was material to ascertain) was alive at the time of the death of the intestate. Now, where the question at issue is not the existence of a document, but a fact, I think that an affidavit cannot be admitted to prove it in an interlocutory application like the present, though the answer neither admits nor denies it. There is an apparent discrepancy between the authorities on the subject, but I think that is the fair result of them (s)."

SECTION 2.

Of Dissolving Special Injunctions.

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| 1. <i>Whether, when the Bill is demurrable, the Defendant may elect to move to dissolve.</i>
2. <i>Of Affidavits.</i>
(a) <i>What limit as to filing.</i> | (b) <i>When Affidavits may be read and when not against the Answer.</i>
3. <i>Of some of several Defendants moving to dissolve.</i> |
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1. WHERE a plaintiff obtains an injunction upon affidavits, the defendant, although he might try the question by

(s) It may be proper here to remind the reader, that if an injunction is to be obtained or sustained on the merits confessed by the answer, the Court does not require for that purpose the degree of certainty which would entitle the plaintiff to a decree.

It is sufficient if upon the answer a case of doubt appears, requiring investigation. See p. 12 of the Treatise, and *Glasscott v. Long*, 3 Myl. & Cr. 451; *Willinck v. Bentinck*, 2 Hare, 1, see p. 11; *Ord v. White*, 3 Beav. 357.

demurrer, is not under any obligation to do so, if he thinks that by moving to dissolve upon affidavits, he can place his case better before the Court (*s*).

The same point in effect arose in *Hudson v. Maddison* (*t*), where it was contended that an objection which can be taken by demurrer or at the hearing cannot be taken on a motion to dissolve an injunction. The Court thought it clear that it may. However, a motion to dissolve on the coming in of the answer will not be permitted to proceed pending a motion for production of documents, because the contents of the documents are part of the discovery which the plaintiff is entitled to extract from the defendant (*u*).

2. On the subject of reading affidavits, several important cases have been decided since the publication of the original Treatise.

(a). First, as to the limit to the filing of affidavits and counter-affidavits.

Generally it may be said that the Court will at any time, before a motion is actually heard, postpone it, to allow of further affidavits, if the respondents desire it. Of course the party moving, can always save his motion if he wishes to file further affidavits. But if a respondent allows a motion to be partly heard, he will not be allowed to read affidavits filed afterwards, nor will the Court postpone the further hearing of the motion to allow such affidavits to be answered. The motion once fairly opened must be heard through, on the affidavits then before the Court (*x*). To this principle must be referred two cases, in which it has been decided, that if a defendant moves upon his answer to dissolve, he cannot read as part of his case affidavits filed after the answer; because, it was said by the Court,

(*s*) *Barnesley Canal Company v. Twibill*, 7 Beav. 19.

(*t*) 12 Sim. 416.

(*u*) *Storer v. Jackson*, 12 Sim. 503.

(*x*) *Electric Telegraph Company v. Nott*, 11 Jurist, 273.

the plaintiff could not reply to such affidavits (*y*). For if the defendant filed after his answer affidavits before the motion, giving due notice, there seems no reason why he should not read his affidavits as well as his answer, treating of course his answer as an affidavit (*z*).

(*b*). Where a notice of motion was given before answer, and affidavits filed in support of it, and the motion stood over at the request of the defendant, that he might put in his answer, and after he had done so, the plaintiff filed further affidavits in respect of title, contradicting the answer: it was held, that under those circumstances the answer must be treated as an affidavit, and consequently the further affidavits were admissible (*a*). But if a motion for a special injunction is made after the answer has come in (the motion not having stood over for the defendant's convenience, and that he may put his answer in), and no affidavits were filed before the answer, affidavits filed after the answer cannot be read in support of the motion even as to matters not connected with title; and that, irrespectively of the question whether the notice was given before the answers were put in, or afterwards (*b*); still more if the motion stood over for the plaintiff's convenience (*c*). The judgment in *Manser v. Jenner*, and the learned reporter's notes, contain nearly all the learning upon this point.

In *Gardner v. M'Cutcheon* (*d*), where, on a motion for an injunction to restrain a partner from getting partnership property into his possession, affidavits had been filed in support of the application, and then the defendant put in his answer, and affidavits were subsequently filed on both sides, it was held that the answer must be treated as

(*y*) *Barwise v. Brooks*, 7 Jurist, 364; and *Corporation of Liverpool v. Morris*, 11 Jurist, 509.

(*z*) *Gardener v. M'Cutcheon*, 4 Beav. 534.

(*a*) *Gibson v. Nicol*, 6 Beav. 422.

See also *Maden v. Veters*, 5 Beav. 503.

(*b*) *Manser v. Jenner*, 2 Hare, 600; *Lloyd v. Jenkins*, 4 Beav. 230.

(*c*) *Woodin v. Field*, 15 Sim. 307.

(*d*) 4 Beav. 534.

an affidavit, and the plaintiff's affidavits might be read against it. This case was referred to in the very recent case of *The Attorney-General v. Strange*(e), where affidavits had been filed with the bill, and an *ex parte* injunction obtained. Then the answer was put in, and then affidavits were *filed* on both sides, and then a motion was made to dissolve. The defendants, instead of reading, formally withdrew their affidavits; and on the plaintiffs tendering theirs filed after the answer, objected to their being read. The case of *Gardner v. M'Cutcheon* was cited, but the Court distinguished the case before it, on the ground that in *Gardner v. M'Cutcheon* the defendant must have read his affidavits, whereas here the defendants had withdrawn theirs. The point did not call however for actual decision, as the plaintiffs' affidavits were rejected on other grounds.

Finally, in a very recent case, it was held, following *Norway v. Rowe* (f), that even where the plaintiff's affidavits are filed before the answer, if the motion is not made till after the answer has been put in, the affidavits cannot be read against the answer on matter of title(g). And here must be noticed another recent case(h) calculated to mislead, as it would appear from the report, that affidavits were read against the answer on a matter of title, on a motion made after answer. The fact was, as I have been informed by counsel engaged in the case, that the motion had stood over for the convenience of the defend-

(e) V. C. K. Bruce, December, 1848, MS.

(f) 19 Ves. 143.

(g) *Rocke v. Matthews*, 12 Jurist, 643. The report is not perfectly clear as to whether the affidavits were tendered on matter of title only, or whether they were also tendered and rejected as to matter of fact. The writer has examined the registrar's minute-book of the day, and from that it ap-

pears clearly that the objection was taken to affidavits being read on a question of title, the contention on the plaintiff's part being that they might be read, even on that question, if filed before the answer. The affidavits were, as mentioned in the text, rejected.

(h) *Commissioners of Greenwich Hospital v. Bluckett*, 12 Jurist, 151.

ant, that he might put in his answer, so that the answer was treated as an affidavit, on the principle of *Gardener v. McCutcheon*. The defendants appealed, and the matter was compromised before the appeal was heard.

It must not be forgotten, that an injunction obtained *ex parte* must stand or fall by the substance of the statements of the bill on which it was obtained. It follows, that affidavits cannot be read in support of the injunction, to prove facts stated by amendment, tending to strengthen the right to the injunction (*i*).

3. It has been doubted whether, where a special injunction has been granted against several defendants, one of them can move to dissolve without bringing the others before the Court. The ground of the doubt is, that if the defendant moving should succeed, he materially changes the position of the other defendants. The Court, however, doubted at the same time whether, if present, the defendants not moving to dissolve, could oppose the motion (*k*). The point was not decided.

(*i*) *Attorney-General v. Strange*, 13 Jurist, 110.

(*k*) *Thompson v. Geary*, 5 Beav. 131.

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